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The Future of Legal Services: Legal and Ethical Implications of the LSC Restrictions - Address: The Future of Legal Services

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SECURITIES ARBITRATION: A CLINICAL EXPERIMENT

Constantine N. Katsoris*

Introduction

Disputes between the securities industry and its customers are generally resolved in arbitration, which is designed to be simpler, cheaper, and faster than courtroom litigation.¹ Such arbitrations between brokers and customers have been held at the New York Stock Exchange since 1872.² Thereafter, other securities industry self-regulatory organizations ("SROs") have also provided a forum for the arbitration of such disputes. However, before 1978, the various SROs had differing rules governing such arbitrations.³

In 1977, the Securities Industry Conference on Arbitration ("SICA") was created to develop a Uniform Code of Arbitration ("Uniform Code") to be used by all the SROs.⁴ The Uniform Code was largely in place at all the participating SROs by 1980.⁵ After the adoption of the Uniform Code, SRO arbitrations grew

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1. See Constantine N. Katsoris, *The Level Playing Field*, 17 FORDHAM URB. L.J. 419, 421 (1989).

2. See PHILIP J. HOBLIN, *SECURITIES ARBITRATION PROCEDURES, STRATEGIES, CASES* 1-2 (2d ed. 1992).

3. See Katsoris, *supra* note 1, at 427.

4. See *id.* at 427-28.

5. See *id.* at 429.

steadily from 830 in 1980⁶ to 7271 in 1995.⁷ Moreover, before 1987, these arbitrations were largely voluntary on the part of the public. Yet after the United States Supreme Court's decision in *Shearson/American Express, Inc. v. McMahon*,⁸ they generally became mandatory.⁹

In 1988, the first full year after *McMahon*, SRO arbitrations more than doubled from the year preceding *McMahon*. In addition to the increase in the number of SRO arbitrations, *McMahon* brought into arbitration more difficult cases, such as those involving violations of the Racketeer Influenced and Corrupt Organization Act,¹⁰ the Securities Act of 1933,¹¹ and the Securities Exchange Act of 1934,¹² as well as employment and discrimination cases.¹³ At that point, arbitration began to look more like the courtroom through the introduction of expanded discovery requests, more frequent prehearing conferences, and other procedures intended to provide safeguards to ensure a fair and complete hearing.¹⁴ Understandably, these additional safeguards raised the costs of arbitration with the result that investors with small claims often found it difficult to obtain counsel to represent them. This often resulted either in the hiring of persons who were not attorneys, or the claimants simply representing themselves, *pro se*.¹⁵

This Article discusses the use of non-attorneys in representing such clients, as well as *pro se* representation by such claimants. It then describes the efforts of the Securities and Exchange Commission ("SEC") to ensure that such claimants have access to adequate and effective representation through the use of law school clinics. Finally, this Article raises numerous issues that must be considered before establishing such clinics, and concludes that

6. See NINTH REPORT OF THE SECURITIES INDUSTRY CONFERENCE ON ARBITRATION 30 (June 1996) [hereinafter NINTH REPORT] (on file with the *Fordham Urban Law Journal*).

7. See *id.*

8. 482 U.S. 220 (1987).

9. See Katsoris, *supra* note 1, at 426.

10. 18 U.S.C. § 1961(c); see generally, DOUGLAS E. ABRAMS, THE LAW OF CIVIL RICO (1991).

11. 15 U.S.C. § 77 (1982).

12. 15 U.S.C. § 78 (1982).

13. See Katsoris, *supra* note 1, at 429-31.

14. See *id.*

15. See Report of the Securities Industry Conference on Arbitration on Representation of Parties in Arbitration by Non-Attorneys, 22 FORDHAM URB. L.J. 507, 511 (1995) (hereinafter NARs Report); see also SAC Award Survey: How Fares the Pro Se Investor in Arbitration?, 8 SEC. ARB. COMMENTATOR 1, 1 (1997) [hereinafter SAC Survey]; *infra* note 36 and accompanying text.

proper planning and adjustment is necessary for a successful clinical program.

I. Representation by Non-attorneys

The general issue of the representation of clients in legal or quasi-legal proceedings by non-attorneys has been a troubling one. Not only has such representation by non-attorneys taken the form of transactional services, i.e., advising, drafting deeds and documents, etc., but it has also spread to actual representation of parties before administrative agencies. Moreover, as more and more disputes are being resolved through alternative dispute mechanisms, such as arbitration, non-attorneys are also representing clients in such proceedings as civil litigation—often involving complex issues and significant sums of money—against litigants who are usually represented by skilled attorneys. Such has been the case with the arbitration of securities disputes.

In 1991, SICA began to receive complaints, particularly in Florida and California, that claimants were increasingly being represented in SRO arbitrations, not by their friends, accountants, business associates, or relatives, but by professional groups who were not attorneys ("Non-Attorney Representatives" or "NARs"). One of the principal arguments the NARs used—in touting the need for their services to public customers in disputes with their brokers/dealers—was that it was often difficult to retain the services of an attorney, especially in small claims.¹⁶

SICA's initial view was that the subject should be handled at the state level, because attorneys general and bar associations have the responsibility for dealing with questions relating to standards and qualifications to practice law.¹⁷ The complaints persisted, however,

16. See *NARs Report*, *supra* note 15, at 516-17.

17. See Constantine N. Katsoris, *Foreword to NARs Report*, 22 *FORDHAM URB. L.J.* 503, 505 [hereinafter *Foreword*]. The *Foreword* contains the following discussion:

The ABA Draft discusses not only pro se representation and legal services delivery by traditional paralegals, but also by so-called legal technicians, who are identified as someone who: is not a lawyer, is not functioning as a traditional paralegal or a document preparer, and is not working with supervision by or accountability of a lawyer.

As to the competence of the legal technicians, or their supervision in rendering their services to the public, the Draft points out that in certain areas of legal technician practice, such as proceedings before some administrative agencies, there are mechanisms to ensure their competency and accountability. In other areas, oversight mechanisms may arise from statutes and rules unrelated to a tribunal; for example, in many jurisdictions, real estate brokers are permitted to assist consumers in completing standardized residential sales contracts under a scheme of regulation related to brokerage functions.

and they raised questions as to whether customers were adequately represented in SRO arbitrations. Accordingly, in 1993, SICA decided it had to address this thorny issue to protect the overall interest of the thousands of claimants using SRO forums annually.¹⁸ Because of the enormous stakes and widely divergent opinions being expressed, SICA decided, for the first time in its existence, to solicit public comment—much like the SEC and other regulatory agencies do prior to adopting a rule—in order to elicit the views of the public and affected parties.¹⁹ SICA held two special meetings, one in California and one in Florida, at which numerous individuals and organizations appeared—including organizations of non-attorney representatives.²⁰

Initially, SICA received some unfavorable publicity, because some in the press *instinctively* came down on the side of consumerism, arguing that NARs provide greater access to the arbitration system.²¹ There were even suggestions that SICA was controlled by lawyers, and therefore its inquiry sought to protect its own.²² Those innuendoes, however, were unwarranted, and the media would surely have reacted quite differently if a destitute person with a justifiable claim lost all of his or her savings and recovered nothing because of incompetent or unethical representation. Undaunted, SICA forged ahead, listened carefully to all parties, examined all of the issues honestly and constructively, and issued its

The Draft goes on to point out, however, that in other situations—such as insurance adjusting and debt counseling—there may be little or no oversight to assure competence. The Draft notes that some legal technicians have been found to be in violation of prohibitions against the unauthorized practice of law, but the enforcement of such prohibitions varies widely across the country. The ABA Draft further notes, however, that “[n]owhere is unauthorized practice of law . . . enforcement given the attention or resources that it received as recently as twenty years ago.”

Foreword, at 503-04 (describing a *Discussion Draft for Comment* entitled *Non-Lawyer Practice in the United States: Summary of the Factual Record before the American Bar Association Commission on Non-Lawyer Practice* issued in April, 1994) (citations omitted) [hereinafter *ABA Draft* or *Draft*].

18. *See id.* at 504. The SICA inquiry was prompted by complaints concerning the quality of such representation; it raised questions as to whether the activities of NARs constituted the unauthorized practice of law, and whether the interests of investors might be jeopardized or compromised by such representation. In addition, there were concerns raised regarding the fact that some NARs employ misleading and inaccurate advertising, and that some NARs had been barred from working in the securities industry by one or more regulatory bodies for violation of the securities law, rules and regulations. *See id.* at 505.

19. *See id.*

20. *See id.* at 506.

21. *See id.*

22. *See id.*

report on NARs representation in securities arbitration ("NARs Report" or "Report").²³ This Report was widely disseminated to many, including state attorneys general and bar associations throughout the country.²⁴

The NARs Report, after thoroughly discussing the pros and cons of non-attorney representation, arrived at numerous conclusions²⁵

23. See *NARs Report*, *supra* note 15, at 507. The Report states:

NARs are not required to meet the ethical standards imposed on attorneys nor are communications with NARs protected by the attorney-client privilege. Attorneys in each state are bound by ethical rules. These rules are enforced either by state bar associations or special commissions appointed to monitor the activities of attorneys. These ethical rules generally prohibit attorneys from:

- Disclosing client confidences;
- Accepting cases for which they are not qualified unless they associate with an attorney who has expertise in the particular field;
- Acting except in the client's best interest;
- Concealing a settlement offer from the clients;
- Making claims which have no basis in law or fact;
- Misrepresenting the law to a forum;
- Charging unreasonable fees;
- Refusing to follow a client's instructions unless the client demands an illegal or unethical activity;
- Knowingly allowing a client to lie to a forum; and
- Charging a non-refundable retainer.

NARs are not bound by any of these strictures. Many of the NARs however, suggested that some form of regulation of their activities was appropriate.

Furthermore, attorneys cannot usually shield themselves from malpractice claims by a corporate structure. In almost every state, attorneys may incorporate but they are held personally liable for acts of malpractice. Many NARs are incorporated and do not appear to hold extensive assets in their corporations. Any recovery against a NAR for negligence would generally be limited to the assets of the corporation.

Id. at 518-19.

24. See *id.* at 524.

25. The *NARs Report* concluded:

Based on its review of the complaints and the information received at the Special SICA Meetings and in written submissions, SICA arrived at the following conclusions about the role of NARs in arbitration:

1. NAR advertising and public relations programs increase awareness of arbitration as a means of resolving or adjudicating a potential claim that a customer may have;
2. solicitation of clients for representation in arbitration, advising them with respect to legal rights, preparing claims in arbitration, and appearing on behalf of a party at a hearing, among other matters *constitute the practice of law*. The performance of these functions by NARs for compensation as a part of their regular business *may constitute the unauthorized practice of law*;
3. fees charged by NARs are generally comparable to those charged by attorneys for representation in arbitration;

and issued several recommendations.²⁶ One of SICA's conclusions was that the representation of clients by NARs for compensation constituted *the practice of law*.²⁷ Indeed, the Supreme Court of Florida²⁸ agreed when it subsequently ruled that compensated non-lawyer representation in securities arbitration constituted the *unauthorized practice of law*, holding that "the protection of the public requires us to step in where there is no such legislation or regulation. Accordingly, we enjoin non-lawyers from representing investors in securities arbitration proceedings for compensation"²⁹

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4. a small number of NARs limit their function to assisting parties in evaluating whether clients have been damaged as a result of wrongdoing and to aiding them in negotiating settlements. In those cases where settlements are reached, it appeared that the cost to the customer generally may be less than the cost of engaging an attorney. NARs who operate in this fashion generally refer customers to attorneys for representation in arbitration if they are unable to reach a settlement;
 5. some NARs advertising is inaccurate and misleading;
 6. some NARs retain outside attorneys or hire attorneys as employees to appear at a hearing. This practice raises a serious question as to whether the attorney represents the NAR or the party;
 7. some NARs are, or are controlled by, former brokers or other securities industry personnel who have been barred or disciplined by the SEC or an SRO, or are lawyers who have been disbarred, suspended or permitted to resign their license as the result of a disciplinary proceeding;
 8. benefits of the attorney-client relationship, such as privilege, adherence to state bar prescribed ethical standards, regulation and malpractice insurance may not be available when using a NAR in arbitration; and
 9. NARs do not limit the size of claims they accept and have represented customers who have substantial claims.

Id. at 522-23 (emphasis added).

26. One of the recommendations of the SICA Report was:

1. that the SROs adopt a rule which would:
 - (a) prohibit any person, or entity controlled by such person, from representing a party in arbitration, directly or indirectly, for a fee or other compensation, if that person is,
 - (i) prohibited from representing a party by the law of the state in which the arbitration will take place,
 - (ii) subject to a bar or suspension from the securities or commodities industry, or a denial of a state securities license, or
 - (iii) an attorney who is disbarred or suspended or has been permitted to resign from the bar as a result of disciplinary action, and has not been readmitted

Id. at 523.

27. *Id.* at 522.

28. *The Florida Bar Re: Advisory Opinion on Nonlawyer Representation in Securities Arbitration*, 696 So. 2d 1178 (Fla. 1997). The Supreme Court's decision approved the position taken by the Florida Bar Standing Committee on the Unauthorized Practice of Law in October 1996. *See id.* at 1181.

29. *Id.* at 1184. It should be noted, however, that the court's decision does not seem to apply to persons who: (i) are licensed to practice law in any jurisdiction, even

Moreover, the Supreme Court of California recently held that a New York law firm, which was not licensed to practice in California, was not entitled to recover fees under a fee agreement for work done within California,³⁰ and, to the extent it practiced law in California, was engaged in the unauthorized practice of law.³¹ The Court further noted that such prohibition extended to arbitration.³² Furthermore, a lower court in California enjoined a non-attorney firm from serving as an advocate in securities arbitration, ruling that such representation constituted the illegal practice of law without a license.³³ Interestingly, the injunction issued in the California case was shortly thereafter introduced against the same NAR in an NASD arbitration in New York, prompting that firm's client "to settle his case rather than see it through."³⁴

II. *Pro Se* Representation

Restricting the extent of NARs representation in securities arbitration proceedings, however, does not alleviate the persistent problem investors with small claims experience in obtaining counsel to represent them as they seek to recoup their damages. In fact, limiting the use of NARs representation can only exacerbate the problem. The result is that investors with small claims often either abandon them in frustration, or decide to represent themselves *pro se*. In this regard, two inquiries were conducted, the General Accounting Office ("GAO") Study³⁵ and the Securities Administration Commentator ("SAC") Survey,³⁶ with somewhat similar results.

A. GAO Study

Several years ago, in response to Congressional inquiry into whether a pro-industry bias existed within the securities/commodities arbitration process, the United States General Accounting Of-

if they are not licensed to practice in Florida; (ii) represent parties to securities arbitrations other than investors; and (iii) represent investors but are not compensated for doing so. *See id.* at 1180, n.1.

30. *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court of Santa Clara County*, 949 P.2d 1, 2-3 (Cal. Sup. Ct. 1998).

31. *See id.*

32. *See id.* at 8-9. The Court of Appeal, however, let stand the firm's right to pursue a claim in quantum meruit. *Id.* at 12.

33. *See Court Bars Non-Attorney Reps from Arbitration Proceedings*, COMPLIANCE REP., Nov. 24, 1997, at 3.

34. *Id.*

35. *See infra* notes 37-42 and accompanying text.

36. *See infra* notes 43-56 and accompanying text.

fice ("GAO") launched a two-year study resulting in a 110-page report entitled "Securities Arbitration: How Arbitration Fares" ("GAO Study").³⁷ After examining statistical results of decisions in arbitration cases at both industry-sponsored and independent forums, the GAO Study found no indication of a pro-industry bias in decisions at industry-sponsored forums.³⁸ In the course of its study, the GAO also focused on the issue of whether attorney representation had any effect on the success of the claimants.³⁹

The GAO Study found that investors were represented about ninety percent of the time when the amount claimed was \$20,000 or more, and that such investors with counsel settled about 1.7 times more frequently than investors without counsel.⁴⁰ More importantly, however, the GAO study found that, although represented investors did not necessarily win more frequently than *pro se* claimants, represented investors' recoveries were 1.6 times more likely to exceed the average recovery rate when they did win.⁴¹ In short, the study confirmed that attorney representation "provides 'value added,' both in terms of negotiating a resolution with brokerage Respondents and in terms of identifying all of the damages to which the truly aggrieved investor is entitled."⁴²

B. SAC Survey

Some five years after the GAO Study, a somewhat similar survey was conducted by the Securities Arbitration Commentator ("SAC Survey").⁴³ The SAC Survey divided its findings into two groups: the first involved awards of \$10,000 or less ("Small Claim" or "Small Claim Awards"), and the second involved awards of more than \$10,000 ("Larger Claim" or "Larger Claim Awards").⁴⁴

1. Small Claim Awards

More than 75% of the Small Claim Awards (2961) surveyed involved *pro se* investors,⁴⁵ and the "win-rate" for those *pro se* inves-

37. See *GAO Study: How Arbitration Fares*, 5 SEC. ARB. COMMENTATOR 1, 1 (1992) [hereinafter *GAO Study*].

38. See *id.*

39. See *id.* at 3.

40. See *SAC Survey*, *supra* note 15, at 1. The SAC survey covered the five-year period from July 1991 to June 1996, whereas the GAO Study covered an 18-month period from January 1989 to June 1990. See *id.*

41. See *id.*

42. *GAO Study*, *supra* note 37, at 3.

43. See *SAC Survey*, *supra* note 15, at 1.

44. *Id.*

45. *Id.*

tors was 44.87%. This compares to an overall “win-rate” of 49% for investors in Small Claim matters.⁴⁶ Moreover, besides a lower “win-rate” than the average, *pro se* investors in *Small Claim matters* recovered less, as a percentage of what they sought when they did win.⁴⁷ Furthermore, of the *pro se* Small Claim investors who submitted their disputes on the papers (without a hearing), 45.9% won a monetary award, whereas 51% of the represented investors were victorious.⁴⁸ Similarly, *represented* investors with Small Claims had a 55.4% win-rate where live hearings were conducted, compared to *pro se* investors who achieved a win-rate of only 41.7% where live hearings were held.⁴⁹

2. Larger Claim Awards

Regarding Larger Claim Awards, the SAC Survey found, as the GAO Study had previously found, that only a small percentage of investors chose the *pro se* route.⁵⁰ In fact, the SAC Survey found that “investors increasingly turn to counsel as the amount of the compensatory claim rises.”⁵¹ In addition, as the compensatory claim amounts increased, the *pro se* investors win-rate declined.⁵² Moreover, for those in the Larger Claim Awards category (over \$10,000), the *pro se* investors had an overall win-rate of 43.6%, but their win-rate declined as the amount in controversy increased—exactly the opposite of the experience of represented investors.⁵³

3. Summary of SAC Survey

The SAC Survey concluded that “investors win more frequently when represented by counsel in every dollar category” tested.⁵⁴ Moreover, the Survey found that represented investors who win

46. *Id.* at 1-2. The SAC Survey identified a 70.2% recovery rate for *pro se* investors in Small Claims Awards versus a 77% recovery rate for Small Claims Awards generally. *Id.* at 2.

47. *See id.* at 2. Interestingly, *represented* investors in Small Claims Awards received a recovery rate that slightly exceeded 100% of the amount sought. *See id.*

48. *Id.*

49. *Id.*

50. *See id.*

51. *Id.* For example, of the Large Claims Awards category, 18% involved *pro se* investors overall, whereas as to compensatory claims exceeding \$50,000, the *pro se* investor claimants’ participation precipitously drops to 9%. *Id.*

52. *See id.*

53. *Id.* For example, for *pro se* investors involved in Large Claims Awards, where the amount in controversy was between \$50,000 and \$100,000, the win-rate dropped to 40.2%, and when the amount sought exceeded \$100,000, a win-rate of only 36.8% was achieved. *Id.* at 2-3.

54. *Id.* at 3.

achieve a "significantly higher recovery rate than *pro se*" investors.⁵⁵ Furthermore, the SAC Survey found the "win-rate disparities between the represented and the *pro se* investors tend to grow as the size of the compensatory claims grow."⁵⁶

III. SEC Initiative

In view of the NARs⁵⁷ and *pro se*⁵⁸ experiences, it is not surprising that when SEC Chairman Arthur Levitt attended a series of town meetings around the country last year, complaints kept surfacing about the difficulty or inability of small investors to obtain adequate and affordable representation in securities disputes. Chairman Levitt, justifiably troubled by such complaints, sought a solution to the dilemma. He suggested that the void could be filled by clinical programs at various law schools throughout the country. Since more SRO arbitrations are held in New York than any other locale in the country, Chairman Levitt sought to launch his pilot program with law schools located in New York City.⁵⁹

Pursuant to this initiative, several meetings were held in New York between representatives of the SEC and several local law schools. At these meetings numerous concerns surfaced, such as: what type of cases would *qualify* for such clinical representation; should fees be charged; would practice orders under which the clinics operated have to be amended; and how would the students be supervised?

It was made clear at the outset, however, that cases should not be referred to clinics where the local bar association could provide adequate coverage. To address the problem, discussions were held with the Association of the Bar of the City of New York ("Bar Association"), which consented to help screen eligible cases for clinical representation. Cases under \$15,000 would be referred to the clinics without screening. For cases above that amount, the Bar Association would seek private counsel to accept the case, and, if it was not successful in its search, the case would be referred to one of the participating clinics.⁶⁰

55. *Id.*

56. *Id.*

57. *See supra* notes 16-34 and accompanying text.

58. *See supra* notes 35-56 and accompanying text.

59. *See SEC Announces Pilot Securities Arbitration Clinic To Help Small Investors*, SEC REL. 97-101 (U.S. Securities and Exchange Commission, Washington, D.C.), Nov. 12, 1997.

60. *See id.*

IV. Planning the Clinic

Clinical education is first and foremost a method of teaching.⁶¹ In fact, it provides to its students the optional means of integrating theoretical, analytical, and ethical skills and goals by combining "the extraordinarily varied and dramatic context of real cases and problems with the opportunity for intensive teaching, supervision, growth and reflection."⁶² Indeed, the *ABA's Report of the Task Force On Law Schools and the Profession: Narrowing the Gap*⁶³

"Washington, D.C. November 12, 1997 Securities and Exchange Commission Chairman Arthur Levitt announced today the start of pilot securities arbitration clinics at two New York law school — Pace University and Fordham University — to help small investors who have difficulty obtaining legal representation.

The clinics were started in response to concerns expressed to Chairman Levitt by small investors at several SEC town meetings. Because their claims are often not large enough, it is difficult for small investors to obtain counsel to represent them in arbitration. To help solve this problem, the Commission is working with law schools in the New York City area to set up pilot arbitration clinics. Students in the pilot programs will, under supervision of a lawyer, assist small investors in the securities arbitration process.

In announcing this pilot program, Chairman Levitt stated. 'These clinics will help small investors who have nowhere else to turn by providing them with high legal representation. It's a win-win proposition: small investors get much-needed legal assistance and students gain valuable learning experience.'

.....
Several other New York law schools are considering joining the pilot program, and the Commission seeks to expand the program to other school across the country.

The Association of the Bar of the City of New York which has a panel of highly experienced securities lawyers, supports this program and has agreed to screen and refer cases to the clinics. Under guidelines established by the Association of the Bar of the City of New York, it will refer cases directly to the clinics that are for claims of \$15,000 or less. For larger claims, the Association of the Bar of the City of New York will attempt to secure an attorney for the investor and, if unsuccessful, it will then refer appropriate matters to the clinic.

Also, the New York Stock Exchange and the National Association of Securities Dealers, Inc. will provide speakers to help educate participating law students on various arbitration topics."

Id.

61. See ASSOCIATION OF AMERICAN LAW SCHOOLS, SECTION ON CLINICAL LEGAL EDUCATION, *Report of the Committee on the Future of the In-House Clinics*, 42 J. LEGAL EDUC. 511 (1992) (hereinafter AALS Clinic Report).

62. *Id.* at 517; see also Geoffrey C. Hazard, *Should Law Schools Include an Apprenticeship?*, NAT'L L.J., March 23, 1998, at A17.

63. *Legal Education and Professional Development—An Educational Continuum: Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*, 1992 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO BAR [hereinafter the MacCrate Report]. But see John J. Costonis, *The MacCrate Report: Of Loaves, Fishes, and the Future of American Legal Education*, 43 J. LEGAL EDUC. 157 (1993).

("MacCrate Report") stressed that the curricula which most American law schools offer do not adequately prepare students for the practice of law.

Much has been written regarding the size, shape, and operation of a clinic, and reasonable people can differ in this regard. Regardless of these differences, however, much thought and planning must go on before a new clinic opens its doors to students and clients. Three of the main areas of concern are:

- a) the basic structure and operation of the clinic;⁶⁴
- b) the implementation of systems for handling the cases,⁶⁵ and,
- c) the classroom component of the clinic.⁶⁶

64. See Philip Schrag, *Constructing a Clinic*, 3 CLINICAL L. REV 175, 177 (1996). Schrag states:

First, I address some basic structural questions that the clinic's supervisor or supervisors might think about when beginning to design or renovate a program. These include the goals of the proposed clinic; the number and qualifications of its teaching and support staff; the desired relationships among staff members; the subject matter of the clinic's cases; the duration of the clinic; the amount of course credit that the students should receive for taking it, and the caseload per student; the grading system; the relationship between the students and the tribunals or other fora in which they will be practicing; how the clinic will deal with client needs during summer and other academic vacations; the clinic's relationships with non-clinical faculty; and systems for recruiting and selecting clinic students.

Id.

65. See *id.* at 178. Schrag states:

The second section pertains to systems for case handling. In it, I focus on decisions about how the teachers and students in a clinic will acquire knowledge of the doctrine and practice in the areas of law in which the clinic will work; what methods teachers will use for supervising students; whether students will work individually or collaboratively; why a clinic might need to generate its own practice and administrative manuals, and what such manuals might contain; and how to think about acquiring a specialized physical and virtual library. This section also discusses planning for a clinic's physical space, equipment, and support services; locating and using experts; generating forms; building systems through which the clinic will acquire institutional memory; developing a standardized filing system; establishing intake sources, guidelines, forms, and systems; building institutional relationships with judges and court administrators; developing systems for closing cases and for the inter-semester transfer of cases from some students to others, when necessary; and creating systems for referring cases and appeals that the law school clinic cannot handle.

Id.

66. See *id.* The author states:

Planning does not end, however, when the clinic opens for business. Clinics evolve in response to constantly changing circumstances in the law school and in the community. Clinic supervisors, like all other bureaucrats, get comfortable with standard operating procedures and may not notice the need to change caseloads or other aspects of clinic administration until adverse con-

It is not the purpose of this Article to set rigid guidelines for establishing new clinics or expanding old ones. The intent, rather, is merely to point out that much planning is necessary. Accordingly, it has been suggested that "to the extent that deans and others are willing to give clinicians at least half a year for planning a new clinic before opening its doors to students and clients, the quality both of teaching and of representation is likely to improve."⁶⁷ This is especially true for securities disputes, where significant substantive and procedural issues are involved and often are quite fact-intensive.⁶⁸

V. The Fordham Clinic

The Fordham Clinic presently has nine faculty members who spend much of their time supervising students who represent clients in five areas: Battered Women's Rights, Civil Employment and Disability Rights, Community Lawyering, Criminal Defense, and Disability (Social Security Act). In each clinic, the faculty-student ratio deliberately is kept low. The current ratio of no more than ten students for every supervising faculty member permits—and the program's pedagogical design requires—intense supervision of students' research and writing and other lawyering skills.

Fordham intended that its new securities arbitration/mediation clinic's role not be limited solely to investors' representation in arbitration. In other words, once a case is accepted, the full panoply of ADR procedures should be available, as with private representation.⁶⁹ For example, the clinic should be free to enter into settlement negotiations before issue is joined. Moreover, if mediation is practical, it should also be available to the clinic. Similarly, if an award has to be confirmed or vacated, the clinic should be able to

sequences (such as declining student enrollment, or the increasing difficulty of locating appropriate clients) are already upon them.

Id. at 242.

67. *Id.* at 241-42.

68. The teaching component of securities arbitration can be quite extensive and include claims as diverse as RICO claims, common law fraud, violations of the securities acts, punitive damages, and employment discrimination. Moreover, one cannot assume all cases will be simple merely because the amount of the claim is small.

69. To handle the new securities cases required an expansion of the Fordham Clinics' practice order. In its application, permission was sought to arbitrate before the SROs, the AAA and other appropriate bodies, including representation in court where no arbitration agreement was present; and, in addition, permission was sought to mediate such disputes, where appropriate.

do so. In addition, if the Eligibility Rule⁷⁰ results in transferring the case into court, the clinic should be free to pursue the claim in court. Accordingly, once representation is accepted, the clinic should be free to act, as any other retained private attorney, to pursue whatever remedy is adequate. This would include bringing an arbitration before the American Arbitration Association ("AAA"), if that were the appropriate forum.⁷¹

Fordham's securities arbitration/mediation clinic will be run by a clinical professor who will have direct responsibility for the cases and supervision of the students. In addition, students will be required to have taken a basic securities law course, a foundations skills course, Evidence (although the rules of evidence are not strictly applied in arbitration, the course is a prerequisite for trial advocacy and an essential course for any litigation), and Trial Advocacy.

Like other live client courses, the program would offer a classroom component and a fieldwork component. The classroom component would frontload substance, procedure, and particular skills and issues posed by these cases with an intensive weekend workshop early in the semester, and a continuation of that focus during the first weeks of classes. During this phase of the course, the clinic would draw on experienced lawyers, from both the private bar, the public sector, and the SROs. As the semester progresses, the focus of the classroom component would shift to the live client cases and the preparation of those cases.

The fieldwork component of the class would involve students working on one or two different cases, in teams of two. Students would handle all phases of the case, from interviewing to discovery to conducting the hearing under the guidance of the clinical supervisor.

VI. Should Fees Be Charged?

The ABA's MacCrate Report⁷² emphasized the serious gap that exists between the theory taught in law schools and the real-world representation of clients. Unfortunately, the Report offers no sug-

70. The Eligibility Rule stems from section 4 of the SICA Uniform Code of Arbitration, which provides that no dispute, claim or controversy shall be eligible for submission to arbitration under this Code if six years have elapsed from the occurrence or event giving rise to the act or the dispute, claim or controversy. See Constantine N. Katsoris, *SICA: The First Twenty Years*, 23 FORDHAM URB. L.J. 483, 493 (1996).

71. See *id.* at 525.

72. See *supra* note 63 and accompanying text.

gestions for funding the expensive training it mandates. Should, therefore, clinics charge to help defray the significant costs of running a clinic?

Those in favor of fee generation argue that, considering the high costs involved, it is the only manner in which an intensive clinical experience can be offered to a large number of law students.⁷³ On the other hand, opponents contend that fee-generating clinics: "(1) undermine the educational goals of clinical education; (2) compromise clinical education's traditional commitment to public-interest lawyering; and (3) lower the academic standing of the individual clinician."⁷⁴

Of particular concern is any program that requires that the clinicians generate their own salaries from such fees.⁷⁵ Although such a structure ensures the financial stability and solvency of the clinic, this author must agree with critics that such a direct arrangement taints the educational goals of clinical education and its traditional commitment to public interest lawyering. However, this does not mean that a client seeking money damages from his broker should not bear some of the cost of the endeavor if a recovery is achieved.⁷⁶

The costs associated with securities arbitration are numerous, aside from salaries and fixed costs. Filing fees and forum fees are not insignificant.⁷⁷ From time to time, expert witnesses must be employed. Why should a successful claimant escape these costs at

73. See Patricia Pierce & Kathleen Ridolfi, *The Santa Clara Experiment: A New Fee Generating Model for Clinical Legal Education*, 3 CLINICAL L. REV. 439, 440-41 (1997).

74. *Id.* at 441.

Additional criticism includes concerns that case demands and pressures minimize the ability of clinicians to pursue scholarship, pose a risk that client billing will become unwieldy and unprecise, force clinicians to select cases from a profit rather than pedagogical perspective, raise ethical issues by "using unpaid student labor to raise money," and alienate the private bar siphoning off clients.

Id.

75. See *id.* Such a program was developed at the Chicago-Kent School of Law and the clinic covered such areas as employment discrimination, civil litigation, domestic and international commercial litigation, federal tax litigation, real estate transactions, criminal defense litigation, immigration, and health law. See *id.*

76. The form and extent of fee recovery can vary from clinic to clinic.

77. See, e.g., NINTH REPORT, *supra* note 6, at 24. The Schedule of Fees for Customer Claimants is:

the expense of a clinic?⁷⁸ If some clinicians have a philosophical objection to the imposition of fees upon a successful recovery of money damages in a securities dispute by a solvent investor, necessary fire-walls can be established to preserve academic integrity. For example, the fees could subsidize other cases where similar expenses will be incurred and no recovery realized.

Conclusion

Adequate and affordable representation of claimants in securities arbitrations has been difficult to obtain in small cases.⁷⁹ Yet, such representation makes a difference in the success of such claimants.⁸⁰

This Article attempts to explain the history behind the Levitt initiative and raises some issues that should be explored by those wishing to join in the clinical experiment. To be effective, however, careful planning must take place before the clinic opens, and must continue long after. As experience is gained, adjustments should be made. "Clinics evolve in response to constantly changing circumstances in the law school and in the community."⁸¹ Indeed, "[l]aws and institutions are constantly tending to gravitate. Like clocks, they must be occasionally cleaned and wound up, and set to true time."⁸²

Amount in Dispute	Filing Fee	Paper	Hearing Session Deposit 1 Arbitrator/3 Arbs.
\$.01-\$1,000	\$ 15	\$15	\$ 15/N/A
\$1,000.01-\$2,500	\$ 25	\$25	\$ 25/N/A
\$2,500.01-\$5,000	\$ 50	\$75	\$100/N/A
\$5,000.01-\$10,000	\$ 75	\$75	\$200/N/A
\$10,000.01-\$30,000	\$100	N/A	\$300/\$400
\$30,000.01-\$50,000	\$120	N/A	\$300/\$400
\$50,000.01-\$100,000	\$150	N/A	\$300/\$500
\$100,000.01-\$500,000	\$200	N/A	\$300/\$750
\$500,000.01-\$5,000,000	\$250	N/A	\$300/\$1,000
Over \$5,000,000	\$300	N/A	\$300/\$1,500

Id. at 24.

78. Moreover, in this area of securities disputes, it is usually not the case that the investor is impoverished, but rather they have difficulty in finding an attorney to handle their small claim.

79. See *supra* notes 16-56 and accompanying text.

80. See *id.*

81. Schrag, *supra* note 64, at 242.

82. HENRY W. BEECHER, *LIFE THOUGHTS* 129 (1858).

MUNICIPAL LIABILITY FOR FAILURE TO INVESTIGATE CITIZEN COMPLAINTS AGAINST POLICE

*Hazel Glenn Beh**

Formalism is often the last refuge of scoundrels; history teaches us that the most tyrannical regimes, from Pinochet's Chile to Stalin's Soviet Union, are theoretically those with the most developed legal procedures. The point is obviously not to tar the Police Department's good name with disreputable associations, but only to illustrate that we cannot look to the mere existence of superficial grievance procedures as a guarantee that citizens' constitutional liberties are secure. Protection of citizens' rights and liberties depends upon the substance of the [citizen complaint] investigatory procedures.¹

I. Introduction

In *City of Canton v. Harris*,² the United States Supreme Court announced that a municipality could be liable under Chapter 42, Section 1983 of the United States Code³ for the misconduct of an employee if deficiencies in a municipal training program were the moving force behind plaintiff's injury and the alleged municipal deficiencies were the result of a deliberate indifference to training police officers.⁴ In adopting the deliberate indifference standard, the Court explained that "a lesser standard of fault would result in

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1. *Beck v. City of Pittsburgh*, 89 F.3d 966, 974 (3d Cir. 1996) (reversing summary judgment in favor of city, evidence creates a jury question), *cert. denied*, 117 S. Ct. 1086 (1997).

2. 489 U.S. 378 (1989).

3. 42 U.S.C. § 1983 (1988), originally enacted as section 1 of the Civil Rights Act of 1871, ch. 22, 17 Stat. 13, provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

42 U.S.C. § 1983.

4. *See Canton*, 489 U.S. at 391.

de facto respondeat superior liability"⁵ and would cause federal courts to engage in an endless exercise of second-guessing municipal-employee training programs."⁶ The Court warned that the federal courts were "ill suited to undertake" such a review and to do so "would implicate serious questions of federalism."⁷ In her concurring and dissenting opinion, Justice O'Connor warned litigants that § 1983 is not intended to serve as a "'federal good government act' for municipalities."⁸ Nevertheless, lower courts instantly expanded liability under *Canton* to include, not just the failure-to-train, but also the failure of other municipal programs which cause constitutional injury to citizens.

The Court, in *Board of County Commissioners of Bryan County v. Brown*,⁹ recently reaffirmed its willingness to permit federal inquiry into the deficiencies of municipal programs which result in constitutional injuries. The deeply divided Court again warned, however, that the federal courts should not micromanage municipal programs and decisionmaking through the hammer of civil rights liability.¹⁰

Following *Canton*, the method in which a municipality addresses citizen complaints against police officers has become the frequent focus of civil rights litigation.¹¹ Federal courts have signaled that a municipality must systematically address citizen complaints as a part of its responsibility to manage and supervise its police officers.¹² A municipality's failure to institute adequate procedures to air citizen complaints may demonstrate deliberate indifference which gives rise to civil rights liability.¹³ Federal judicial decisions reveal the type of response to civilian complaints of police misconduct the courts expect from municipalities. Adverse decisions provide municipalities with notice of a judicial willingness to evaluate procedures for reviewing police misconduct complaints. These

5. *Id.* at 392; see also *Monell v. New York City Dep't of Social Services*, 436 U.S. 658 (1978) (holding that there is no municipal respondeat superior liability in civil rights claims).

6. *Id.*

7. *Id.*

8. *Id.* at 396 (O'Connor, J., concurring in part and dissenting in part).

9. 117 S. Ct. 1382 (1997).

10. See *id.* at 1394.

11. One of the first cases was *Fiacco v. Rensselaer*, 783 F.2d 319 (2d Cir. 1986), cert. denied, 480 U.S. 922 (1987), cited with approval in *Canton* for employing a deliberate indifference standard. See *Canton*, 489 U.S. at 387 n.6, 389 n.7.

12. See *infra* part IV.

13. Of course, municipal liability first turns on establishing that plaintiff suffered a constitutional injury at the hands of a government official. See *City of Los Angeles v. Heller*, 475 U.S. 796 (1986).

procedures fall within the limits of judicial oversight prescribed by *Canton* and *Brown*.¹⁴

A claim that the citizen complaint process shows deliberate indifference is different than a claim that the amount of complaints lodged or incidences of misconduct indicate a custom or policy under *Monell v. New York Department of Social Services*.¹⁵ Similar

14. Liability or potential liability found: *Beck v. City of Pittsburgh*, 89 F.3d 966 (3d Cir. 1996) (judgment as a matter of law reversed; question of fact whether Pittsburgh's investigatory procedures against officers were adequate), *cert. denied*, 117 S. Ct. 1086 (1997); *Vann v. City of New York*, 72 F.3d 1040 (2d Cir. 1995) (summary judgment reversed; question of fact whether police system showed deliberate indifference in monitoring complaints); *Parrish v. Luckie*, 963 F.2d 201 (8th Cir. 1992) (jury verdict against North Little Rock, Arkansas affirmed); *Gentile v. County of Suffolk*, 926 F.2d 142 (2d Cir. 1991) (verdict against county affirmed); *Bordanaro v. McLeod*, 871 F.2d 1151 (1st Cir. 1989) (verdict affirmed, City of Everett, Massachusetts, liable), *cert. denied*, 493 U.S. 820 (1989); *Fiacco v. City of Rensselaer*, 783 F.2d 319 (2d Cir. 1986) (verdict against Rensselaer, New York, affirmed), *cert. denied*, 480 U.S. 922 (1987); *Gonsalves v. City of New Bedford*, 939 F. Supp. 915 (D. Mass. 1996) (imposing municipal liability on City Council and Mayor); *Hogan v. Franco*, 896 F. Supp. 1313 (N.D.N.Y. 1995) (summary judgment in favor of Utica, New York, denied); *Illiano v. Clay Township*, 892 F. Supp. 117 (E.D. Pa. 1995) (Clay Township's motion to dismiss denied); *Carney v. White*, 843 F. Supp. 462 (E.D. Wis. 1994) (Village of Darien's summary judgment denied), *aff'd*, 60 F.3d 1273 (7th Cir. 1995); *Cox v. District of Columbia*, 821 F. Supp. 1 (D.D.C. 1993) (verdict against Washington, D.C.), *aff'd*, 40 F.3d 475 (D.C. Cir. 1994); *Brown v. City of Margate*, 842 F. Supp. 515 (S.D. Fla. 1993) (Margate, Florida's summary judgment denied), *aff'd*, 56 F.3d 1390 (11th Cir. 1995); *Bosley v. Foster*, No. Civ. A. 90-2409-L, 1992 WL 40696, at *1 (D. Kan. Feb. 5, 1992) (summary judgment in favor of Kansas City); *Curran v. City of Boston*, 777 F. Supp. 116 (D. Mass. 1991) (Boston's motion to dismiss denied); *Vasquez v. Reid*, No. 90 C. 1585, 1990 WL 207456, at *1 (N.D. Ill. Dec. 6, 1990) (Chicago's motion to dismiss denied); *Sango v. City of New York*, No. 83 CV 5177, 1989 WL 86995, at *1 (E.D.N.Y. July 25, 1989) (New York's summary judgment denied).

No liability or potential for liability: *Andrews v. Fowler*, 98 F.3d 1069 (8th Cir. 1996) (summary judgment in favor of North Sioux City, South Dakota affirmed); *Searcy v. City of Dayton*, 38 F.3d 282 (6th Cir. 1994) (affirming summary judgment, no evidence that failure to investigate past misconduct caused injury); *Wilson v. City of Chicago*, 6 F.3d 1233 (7th Cir. 1993) (no municipal liability for inadequate investigation of misconduct although investigations inadequate, no deliberate indifference); *Vukadinovich v. Zentz*, 995 F.2d 750 (7th Cir. 1993) (affirming jury verdict in favor of City of Valparaiso, no evidence investigation of police misconduct was inadequate); *Brooks v. D.R. Scheib*, 813 F.2d 1191 (11th Cir. 1987) (verdict against Atlanta reversed, lack of citizen participation in review of misconduct does not show deliberate indifference); *Sarus v. Rotundo*, 831 F.2d 397 (2d Cir. 1987); *Evans v. Avery*, No. Civ. A. 94-10194-WGY, 1995 WL 170056, at *1 (D. Mass. Mar. 14, 1995), *aff'd* 100 F.3d 1033 (1st Cir. 1996), *cert. denied*, 117 S. Ct. 1693 (1997); *Schuurman v. Town of Nor Reading*, No. Civ. A. 90-10692-MLW, 1995 WL 464915, at *1 (D. Mass. June 15, 1995) (North Reading's motion for summary judgment granted); *Chudzik v. City of Wilmington*, 809 F. Supp. 1142 (D. Del. 1992) (summary judgment granted); *Taylor v. Canton, Ohio Police Dep't*, 544 F. Supp. 783 (N.D. Ohio 1982) (no city liability).

15. 436 U.S. 658 (1978). *Monell* holds that a municipality may be liable for its unconstitutional policies and customs. *Id.* at 690-91.

to an allegation that the number of past complaints evidences a policy or custom of abusive conduct, a deliberate indifference claim also relies upon evidence of past citizen complaints. In a deliberate indifference case, however, plaintiffs allege that the failure to develop a comprehensive system to review citizen complaints amounts to deliberate indifference to a municipality's obligation to supervise employees. This allegation exposes municipalities to civil rights liability without regard to the number of citizen complaints received. With such an allegation, courts do not ask whether the number of complaints evidences a custom or policy of abuse. Instead, courts ask whether the municipality's complaint procedure is so deficient as to amount to deliberate indifference to the need to supervise officers.

Parts II and III briefly describe the emerging professionalism of law enforcement and, within this context, discuss the risks and benefits associated with current models for receiving and reviewing citizen complaints against police officers. Part IV discusses courts'

The claim that the existence of past complaints of police misconduct alone proves a municipal custom or policy of misconduct is difficult to prove based upon the mere numbers of complaints received. *See, e.g.,* Carter v. District of Columbia, 795 F.2d 116, 126, 133 (D.C. Cir. 1986) (holding that the number of complaints alone is insufficient to prove a custom or policy of abuse); Sarus v. Rotundo, 831 F.2d 397, 401-02 (2d Cir. 1987) (holding that past complaints are insufficient to prove custom or policy). Understandably, courts generally recognize that police officers are vulnerable to unfounded claims of abuse. *See* Brooks v. Scheib, 813 F.2d 1191, 1194 (11th Cir. 1987) (holding that officers working in high crime areas are likely subject to higher numbers of complaints). The need to balance competing interests has led the Court to adopt qualified immunity for individual officers. *See* Hunter v. Bryant, 502 U.S. 224, 229 (1991) (holding that qualified immunity "gives ample room for mistaken judgments") (quoting Malley v. Briggs, 475 U.S. 335, 343 (1986)); Anderson v. Creighton, 483 U.S. 635, 638 (1987) (stating that it is undesirable to "inhibit officials in the discharge of their duties" and qualified immunity "accommodate[s] these conflicting concerns"). Police departments are unique para-military organizations and their employees necessarily confront and legitimately employ violence with split-second judgment. *See* THOMAS J. DEAKIN, POLICE PROFESSIONALISM: THE RENAISSANCE OF AMERICAN LAW ENFORCEMENT 214 (1988); DOUGLAS PEREZ, COMMON SENSE ABOUT POLICE REVIEW 43-44 (1994). In this atmosphere, even some well-grounded complaints will be lodged against most police departments. The Supreme Court has cautioned that some misconduct by employees will not tarnish the municipal employer serving an important public function by providing law enforcement. *See* Pembaur v. Cincinnati, 475 U.S. 469, 480 (1986) (finding that a single incident by a decisionmaker with final authority constitutes a policy); Oklahoma City v. Tuttle, 471 U.S. 808, 814 (1985) (plurality opinion) (single incident is not sufficient to impose municipal liability); *see also* Brown, 117 S. Ct. at 1392-93, (questioning but not deciding whether proof of a "single incident" is ever sufficient to establish municipal liability where the constitutional tort is not based upon direct municipal action by a policy maker). A plaintiff asserting municipal liability by alleging a policy or custom based upon the mere numerosity of past complaints without more will likely fail.

application of the deliberate indifference standard to claims that a citizen complaint procedure is inadequate and summarizes litigation in several small and large communities employing the various models for complaint review. Additionally, Part IV examines the issues of proof raised in *Canton* and reinforced in *Brown*. The Article divides the cases by the models employed; however, the potential deficiencies in any model and the issues of proof suggested by the Court in *Brown* find substantial commonality regardless of the model a municipality adopts. Part V summarizes some of the judicially-dictated minimum standards by which towns and cities should assess their own complaint review procedure.

II. Municipal Police Forces Move Toward Professionalism

The modern police force is vastly different than its counterpart of just twenty years ago.¹⁶ Recruits in major municipalities typically undergo substantial assessment and training prior to serving on a police force. This screening and training includes psychological screening prior to selection to ensure suitability and stability,¹⁷ complete full-time basic training in police science,¹⁸ and general education requirements.¹⁹ Experienced officers undertake special-

16. See DEAKIN, *supra* note 15, at 255-300.

17. See THEODORE BLAU, *PSYCHOLOGICAL SERVICES FOR LAW ENFORCEMENT* 69-162 (1994). The typical major police department employs psychologists to evaluate both recruits and officers. Psychologists screen and assess recruits, determine fitness for duty, and assess suitability for special unit assignment. *See id.*; Thomas H. Wright, *Pre-Employment Background Investigations*, 60 FBI LAW ENFORCEMENT BULL. 16 (1991) (discussing the evolution to a more complex pre-employment background check including polygraph, education, previous employers, spousal interviews, credit checks, criminal history checks, military history, and driving records among others).

18. While the training time and subjects vary, municipal and state governments invest considerable resources in initial training. "[A] number of states have implemented mandatory state-wide selection standards while others have not; some states mandate an [sic] minimum of three weeks of recruit basic training, while others mandate a 16-week recruit basic training period . . ." Albert A. Apa & Thomas J. Jurkanin, *Police Officer Standards & Training Commissions: Three Decades of Growth*, 57 THE POLICE CHIEF 27, 30 (1990); DEAKIN, *supra* note 15, at 272.

19. Today, 65% of police officers have some college credit and 25% are college graduates. *See* Larry Armstrong & Clinton Longenecker, *Police Management Training: A National Survey*, 61 FBI LAW ENFORCEMENT BULL. 22, 26 n.2 (1992); David L. Carter & Allen D. Sapp, *College Education and Policing: Coming of Age*, 61 FBI LAW ENFORCEMENT BULL. 8 (1992). In comparison, in 1970, only 14.6 % of American police officers had completed two years of college; by 1994, approximately 44.7% have two or more years of college. Increased education appears to correlate with decreased complaint rates and 95% of police departments now require at least a high school diploma. *See* Alan Vodicka, *Educational Requirements for Police Recruits*, 42 LAW & ORDER 91, 93 (1994). *See generally*, DEAKIN, *supra* note 15, at 272, 283 (stating that in the past 30 years, "a 23% advance in the collegiate educational

ized and/or refresher training periodically,²⁰ receive substantial training for supervisory positions,²¹ and perform under chain of command and supervision models which attempt to ensure order within departments.²² Furthermore, many major municipal police academies are accredited by the Commission on Accreditation for Law Enforcement Agencies ("CALEA")²³ and must meet minimum national standards in multiple areas of law enforcement.²⁴ Studies suggest that higher educational levels among police officers result in lower numbers of citizen complaints.²⁵ Large municipal police departments continuously employ innovative new policing programs in an effort to improve their community responsiveness and community relations while reducing both complaints against officers and crime against citizens. Community policing and diversity training programs are recent examples of efforts by modern police departments to respond to citizen concerns.²⁶

level of America's police" and less than 1% of officers have not completed high school).

20. See Apa & Jurkanin, *supra* note 18, at 28; *IACP Addresses Police Brutality Concerns: "Project Response" Underway*, 58 THE POLICE CHIEF 10 (1991) (describing the "Training Keys" series, a model in-service training program in use for over 25 years throughout most police departments); DEAKIN, *supra* note 15, at 197-208, 271-83 (tracing trends in training throughout nation).

21. See Deakin, *supra* note 15, at 271-84; Armstrong & Longenecker, *supra* note 19, at 23-27. Armstrong and Longenecker reported that:

[t]he results indicated that 97% of the police agencies surveyed [144 police departments including the two largest in each state] provide in-house supervisory training to newly promoted officers and that 78% of these agencies make the training mandatory. . . . Eighty three percent of the department require 25 hours, 37% require at least 40 hours, and 23% require over 65 hours [for officers promoted to first line supervisor]. . . . [S]urvey results showed that 81% of the departments provide an opportunity for managerial training.

Armstrong & Longenecker, *supra* note 19, at 23-27.

22. Cf. BLAU, *supra* note 17, at 36.

23. See Deakin, *supra* note 15, at 313-15 (describing movement toward accreditation); Raymond E. Arthurs, Jr., *Accreditation: A Small Department's Experience*, 59 FBI LAW ENFORCEMENT BULL. 1, 1, 5 n.1 (1990). CALEA brought together four influential police organizations: International Association of Chiefs of Police (IACP), National Organization of Black Law Enforcement Executives (NOBLE), the National Sheriffs' Association (NSA), and the Police Executive Research Forum (PERF) to formulate standards for administration, operations, and organization among others. See *id.* Over 300 law enforcement agencies have been accredited. See BLAU, *supra* note 17, at 2.

24. See Apa & Jurkanin, *supra* note 18, at 28. Nearly every state has established commissions empowered to set mandatory minimum requirements of Police Officer Standards and Training (POST commissions). See *id.*

25. See Vodicka, *supra* note 19, at 92.

26. See, e.g., John E. Eck, *Alternative Futures for Policing*, in POLICE INNOVATION AND CONTROL OF THE POLICE 59-80 (David Weisburd & Craig Uchida, eds., 1993)

When modern police forces train officers to set standards of competency,²⁷ screen recruits for suitability,²⁸ provide additional training for supervisors,²⁹ develop innovative new police operation programs,³⁰ and effectively employ either an internal or external review of citizen complaints,³¹ local taxpayers should not be liable for the misdeeds of its police officers under *Monell*³² or *Canton*³³ theories of liability. A municipality is not liable for the misconduct of its employees under section 1983 based upon respondeat superior tort principles, and, without evidence that it failed its municipal duties, mere misconduct by its employees will not be sufficient to establish municipal liability.³⁴ Failure to develop an effective

[hereinafter POLICE INNOVATION]; see also DENNIS ROSENBAUM, THE CHALLENGE OF COMMUNITY POLICING (1994) (evaluating effectiveness of new community policing programs); Stephen M. Hennessey, *Achieving Cultural Competence*, 60 THE POLICE CHIEF 46 (1993) (discussing recruit training in cultural diversity); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 565-591 (1997); R. Morrison, *Problem-Oriented Policing*, 41 LAW & ORDER 84 (1993) (discussing proactive policing techniques); Max Raterman, *Police Supervision at a Crossroads*, 42 LAW & ORDER 79 (1994) (discussing modern management styles); David Rudovsky, *Police Abuse: Can the Violence Be Contained?*, 27 HARV. C.R.-C.L. L. REV. 465, 496 (1992) (community policing model built on premise of "mutual respect" and hope is that it will curb abuse).

27. See *Signorile v. City of New York*, 887 F. Supp. 403, 422-23 (E.D.N.Y. 1995) (stating in a summary judgment in favor of municipality: "sworn affidavit of a NYPD deputy commissioner of training describing the training police officers receive. Moreover, the affidavit indicates that training is supplemented and updated 'on a continual basis'"); *Fulwood v. Porter*, 639 A.2d 594, 600 (D.C. App. 1994) ("officers trained adequately and receive refresher courses . . . are instructed, on a continuing basis . . . approximately 24 weeks of training received by new officers . . . refresher training . . . consists of 120 hours of instruction and is offered a minimum of 12 times a year").

28. See *Longin v. Kelly*, 875 F. Supp. 196, 200 (S.D.N.Y. 1995) (finding no liability for deliberate indifference in hiring officers with violent propensity when a psychologist screened recruits and certain scored individuals receive heightened scrutiny before recommendations for acceptance as officers were made).

29. Cf. *Bordanaro v. McLeod*, 871 F.2d 1151, 1161 (1st Cir. 1989) (finding municipal liability where officers were affirmatively discouraged from seeking further training).

30. See *Signorile*, 887 F. Supp. at 423 (finding no municipal liability where police and Housing Authority met to plan better coordination and identify areas where training could be improved).

31. Cf. *Bordanaro*, 871 F.2d at 1162 (criticizing a municipality which "chose to take no disciplinary actions against officers until they had been indicted").

32. 436 U.S. 658 (1978).

33. 489 U.S. 378 (1989).

34. See *Monell*, 436 U.S. at 663-64 n.7. The Court stated: "the doctrine of respondeat superior is not a basis for rendering municipalities liable under § 1983 for the constitutional torts of their employees." *Id.* Despite language favorable to municipalities, *Monell* actually marked an expansion of municipal liability, overruling *Monroe v. Pape*, 365 U.S. 167 (1961), which had insulated municipalities from civil

program to handle citizen grievances of police misconduct is, however, a municipal deficiency. Developing a grievance procedure which satisfies *Canton*³⁵ has proven a difficult challenge to both small and large communities.

III. Complaint Review Procedures

In the wake of shocking police scandals, high profile *ad hoc* commissions are sometimes convened in major cities to review police misconduct.³⁶ While these commissions often result in calls for major reform and focus attention on problems of misconduct, these after-the-fact inquiries do not satisfy a department's on-going responsibility to receive and address citizen complaints of police misconduct on a regular basis.³⁷ The typical metropolitan police force no longer awaits the results of *ad hoc* investigations of misconduct to reveal problem officers. Instead, it has procedures to receive and investigate citizen complaints and to discipline misbehaving officers to the extent permissible under union contracts and public employment law.³⁸

rights liability by concluding municipal corporations were not persons within the meaning of the Civil Rights Act. See generally Michael Gerhardt, *The Monell Legacy: Balancing Federalism Concerns and Municipal Accountability Under Section 1983*, 62 S. CAL. L. REV. 539 (1989) (tracing Supreme Court decisions following the line of *Monell*); Douglas Colbert, *Bifurcation of Civil Rights Defendants: Undermining Monell in Police Brutality Cases*, 44 HASTINGS L.J. 499, 518-21 (1993) (discussing legislative history of Civil Rights Act, *Monroe* and *Monell* decisions).

35. 489 U.S. 378 (1989).

36. These well-publicized 'blue ribbon' commissions typically form in response to a particular scandal and make recommendations for change; some became permanent bodies. See John Dombink, *The Touchables: Vice and Police Corruption in the 1980s*, in POLICE DEVIANCE 61-98 (Thomas Barker & David L. Carter, eds., 1991) [hereinafter DEVIANCE]; PEREZ, *supra* note 15, at 19-34; Samuel Walker, *Historical Roots of the Legal Control of Police Behavior*, in POLICE INNOVATION, *supra* note 26, at 32-52; DEAKIN, *supra* note 15, at 105-08.

37. See Rudovsky, *supra* note 26, at 497 (recommending that review of citizen complaints is a necessary component of accountability).

38. There is little acknowledgment in case law for the conflict between the need to discipline and the need to afford officers employment rights and protections. See *Click v. Bd. of Police Comm'rs*, 609 F. Supp. 1199, 1205 (W.D. Mo. 1985) (holding that police officer has right to notice and opportunity to be heard before suspension without pay); see also Werner E. Petterson, *Police Accountability and Civilian Oversight of Policing: An American Perspective*, in COMPLAINTS AGAINST THE POLICE: THE TREND TO EXTERNAL REVIEW 259, 270 (Andrew J. Goldsmith ed., 1991) [hereinafter COMPLAINTS]; Jan TenBruggencate, *Police Rehire Officer Fired In Exotic Dancer Case*, THE HONOLULU ADVERTISER, April 8, 1997, at B-1 (labor arbitrator orders police officer who was dismissed for tampering with evidence and sexual misconduct with arrestee to be rehired); Richard J. Terrill, *Civilian Oversight of the Police Complaints Process in the United States: Concerns, Developments, and More Concerns*, in COMPLAINTS 291; Mitchell Tyre & Susan Braunstein, *Building Better Civilian*

The systematic collection, review, and disposition of citizen complaints against police officers follows many models.³⁹ The simplest model, still employed in small towns, involves informal investigation and discipline of officers by supervisory officers.⁴⁰ Large and mid-size police departments ordinarily employ "internal affairs" units to investigate complaints of misconduct independently.⁴¹

Review Boards, 63 FBI LAW ENFORCEMENT BULL. 10, 14 n.3 (1994), citing Judith Secher, *Legal Considerations Involving Civilian Review of Police Conduct*, THE POLICE CHIEF 11 (March 1993) ("Framers [of civilian review boards] need to consider potential legal conflicts with applicable police officer bills of rights and collective bargaining agreements. In addition, jeopardy to criminal cases might arise through granting immunity for subpoenaed testimony."); Paul West, *Investigation and Review of Complaints Against Police Officers: An Overview of Issues and Philosophies*, in *DEVIANCE*, *supra* note 36, at 373-99.

39. D. Carter, *Police Disciplinary Procedures: A Review of Selected Police Departments*, in *DEVIANCE*, *supra* note 36, at 351 (descriptive survey of 20 major United States police departments); PEREZ, *supra* note 15, at 230-49 (comparative evaluation of internal, civilian, and hybrid forms of police review systems); Richard Jones, *Processing Civilian Complaints: A Study of the Milwaukee Fire and Police Commission*, 77 MARQ. L. REV. 505, 508-509 (1994) (citing Samuel Walker & Vic Bumpus, *Civilian Review of The Police: A National Survey of the Fifty Largest Cities* (1991); West, *supra* note 38, at 373-99 (describing external and internal complaint review models). Large cities typically utilize both internal review and civilian, independent complaint review. See Lee P. Brown, *The Civilian Review Board: Setting a Goal for Future Obsolescence*, 58 THE POLICE CHIEF 6 (1991) (sixty per cent of fifty largest cities have civilian review in addition to internal complaint review).

Utilizing both internal and external review may be beneficial. On one hand, internal affairs systems may be more effective:

Numerous studies support the conclusion that civilian review boards are less likely to sustain charges against police officers than chiefs acting on the results of police internal affairs investigations and that, furthermore, civilian boards are more lenient in disciplinary recommendations when officers are found guilty.

Tyre & Braunstein, *supra* note 38, at 10, 14 n.3. Thus, a purely civilian review system without internal review may not achieve desired results. On the other hand, civilian review fulfills two valuable functions, first, it provides an independent receptacle for complaints and second, provides for public participation and confidence in system. See Sa'id Wekili & Hyacinth E. Leus, *Police Brutality: Problems of Excessive Force Litigation*, 25 PAC. L.J. 171, 192-96 (1993) (stating that the purpose of civilian review is to conduct independent investigations and restore public confidence). However, there is skepticism that multiple complaint procedures are necessary or effective. See *id.*; see also Edward J. Littlejohn, *The Civilian Police Commission: A Deterrent of Police Misconduct*, 59 U. DET. J. URB. L. 5, 10 (1981); Rudovsky, *supra* note 26, at 497 ("civilian review is a necessary component of a system of accountability").

40. See PEREZ, *supra* note 15, at 87.

41. *Id.* at 88. "This model represents the overwhelming majority of review system types; 83.9 percent of all police review systems are exclusively internal, completely police-operated systems." *Id.* at 82 (citation omitted). Typically, internal affairs units address both internally and externally generated complaints. See *id.* at 91.

Internal Affairs units are not uniformly structured. One model operates wholly independently, one shares an investigatory role with the officer's supervisory officers, and one allocates primary investigatory responsibility with supervisors and oversight

Larger municipalities have moved toward external review by citizen boards.⁴² Usually, these boards do not replace internal investigation of misconduct. The citizen boards do, however, provide an independent receptacle for, and an independent review of, complaints.⁴³ Several cities employ an integrated, hybrid system with both civilian and police roles in receiving and disposing of citizen complaints.⁴⁴

Each model of citizen complaint review has potential advantages and disadvantages;⁴⁵ no system is ideal.⁴⁶ Informal systems vest inordinate discretion in supervisory personnel, and their success de-

and review to the internal affairs. See West, *supra* note 38, at 395, citing H. Beral & M. Sisk, *The Administration of Complaints by Civilians Against the Police*, 77 HARV. L. REV. 499 (1964).

42. See generally COMPLAINTS, *supra* note 38; PEREZ, *supra* note 15, at 88; Brown, *supra* note 39.

43. See PEREZ, *supra* note 15, at 82-83; Petterson, *supra* note 38, at 279.

44. See PEREZ, *supra* note 15, at 164-95. Perez believes that a hybrid system, which has roles for both civilian and police in the complaint review process, combines the best of internal investigation with the best of civilian review. See *id.*

Other studies describe external review as following one of three models: civilian review, civilian input, and civilian monitor. Citizen involvement is greatest in the civilian review model (civilians investigate, adjudicate, and recommend punishment to chief); less so in civilian input (receive and investigate); and least involvement in the civilian monitor system (internal process with civilian review of procedure for fairness and adequacy). See West, *supra* note 38 at 395.

45. Douglas Perez conducted a comparative study of police review systems over seventeen years. Three kinds of systems, internal, external, and hybrid were identified. He tested each for 1) the integrity (thorough, fair, objective) of the system; 2) the legitimacy (public confidence) in the system; and 3) the learning (impact on future conduct) occurring as a result of the system. See PEREZ, *supra* note 15, at 72-81. Perez concludes that complaints should be received through multiple receptacles, located both within the department and outside the department. He also prefers a hybrid investigatory system with either internal investigation coupled with a civilian monitor role or a shared investigation system where non-police question complainants. Perez concludes that not all complaints merit hearings, but when hearings are necessary, a multidisciplinary hearing board is preferred. See *id.* at 250-66. He also concludes that the final decision to discipline be retained by the police executive, as is typical. See *id.* at 239, 268; see also Goldsmith, *External Review and Self Regulation*, in COMPLAINTS, at 33-38 (identifying drawbacks of civilian review: police resistance to a civilian role, procedural deficiencies, nonprofessional investigations); Jones, *supra* note 39, at 517 (explaining that Milwaukee uniquely vests disciplinary authority in Commission); Bill Ong Hing, *Border Patrol Abuse: Evaluating Complaint Procedures Available to Victims*, 9 GEO. IMMIGR. L.J. 757, 798 (1995) (describing and evaluating INS's newest complaint procedures by an independent office within the Department of Justice; noting labor opposition to review); West, *supra* note 38, at 395.

46. See West, *supra* note 38, at 399 ("There is obviously not 'one best model' that can be placed within a police organization. Rather, factors such as community attitude and support for the police, the presence of police malpractice problems, allegations of police department cover-ups, and the sociopolitical environment of the community must all be considered in a complaint review program.")

pend upon the integrity and effectiveness of supervisors and the chief of police. An informal system also lacks accountability and oversight.⁴⁷ While an informal system may function well under an effective leader, it just as easily permits cover up and neglect to flourish under an ineffective leader.

Internal affairs systems provide safeguards absent in an informal system. In the internal affairs model, formalized policies and procedures are promulgated to guide the initiation and conduct of investigations. Additionally, professional investigators, following standard investigatory procedures, staff the internal affairs unit. Thus, complaints against officers, in theory, are investigated with the same diligence as the department's other criminal investigations. Furthermore, the devotion of full-time manpower to an internal affairs unit demonstrates a municipality's sincere commitment to uncovering abuse, unlike an informal system where such investigations are merely an incidental supervisory task. Most notably, as compared to civilian review, the internal affairs system appears to have a superior record of sustaining complaints and recommending discipline.⁴⁸ Police investigators apparently hold officers accountable for their conduct more often than civilians investigating and judging misconduct. Advantages of an internal affairs systems include efficiency, as well as the professionalism of investigators and their ability to understand law enforcement issues.⁴⁹ Finally, the location of an internal affairs unit within the department helps to ensure communication between the investigatory unit and those making personnel decisions. Disadvantages of internal affairs systems include, most significantly, profound public distrust and the potential for biased, self-serving and superficial investigations.⁵⁰ Public distrust manifests itself as public fear or reluctance to report misconduct to the police or a lack of confidence in the results. Failure to report abuse or a systematic disregard of reported complaints undermines the effectiveness of the whole

47. See PEREZ, *supra* note 15, at 104 (informal systems permit cover-ups, regardless of whether abuses occur or not, and discourage complainants from filing complaints).

48. See *supra* note 39 and accompanying text.

49. See PEREZ, *supra* note 15, at 104 ("primary strength of the internalized review process is the competence and professionalism of its investigators").

50. See Goldsmith, *supra* note 38, at 24-28.

complaint system.⁵¹ In addition, the public's distrust undermines its belief in the legitimacy of the police.⁵²

Civilian review boards cure the real or perceived bias and intimidation problems inherent in internal civilian complaint models.⁵³ Advantages of citizen review boards include increased public access because the process appears less threatening,⁵⁴ a public perception of the independence of the investigatory process, and an increased public confidence in the evaluative process.⁵⁵ Civilian review is typically, though not always, more open to public scrutiny.⁵⁶ A citizen review system, however, also has disadvantages.⁵⁷ Chief among those disadvantages is the apparent tendency of civilians to judge police officers less harshly, to recommend lighter discipline, and the lack of professionalism of civilian investigators.⁵⁸ Most

51. See Goldsmith, *supra* note 38, at 21-24.

52. See generally PEREZ, *supra* note 15, at 102-22; Sean Hecker, *Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review Board*, 28 COLUM. HUM. RTS. L. REV. 551, 603 (1997); Rudovsky, *supra* note 26, at 497. Ironically, internal affairs departments noted for their rigor and unrestricted investigatory powers lead police officers to view some internal systems as tyrannical and unfair. See generally PEREZ, *supra* note 15, at 102-22; Sean Hecker, *Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review Board*, 28 COLUM. HUM. RTS. L. REV. 551, 603 (1997); Rudovsky, *supra* note 26, at 497..

53. See Livingston, *supra* note 26, at 665-66.

54. The United States Civil Rights Commission recommends external locations to file complaints, and surveys of complainants indicate the same. See PEREZ, *supra* note 15, at 102-03; Petterson, *supra* note 38, at 277 (commenting that fear of retaliation discourages complaints).

55. PEREZ, *supra* note 15, at 148-49 (revealing that complainants surveyed "are impressed with the civilian system; they are comfortable talking to civilians about their grievances; and they have more faith in civilian investigators"); Livingston, *supra* note 26, at 663-65 (civilian review increases integrity of process and public confidence).

56. See PEREZ, *supra* note 15, at 132.

57. The efficacy of civilian review is not yet known. However, public confidence is a laudable goal in and of itself.

The actual effectiveness of civilian review in . . . law enforcement is unclear. Some studies show that determinations made by civilians do not differ substantially from those made by the police department; others show that civilian review procedures sustain citizen complaints at rates not significantly higher than those reported by internal affairs units. But the vigor of investigations seems to be greater in cities with civilian review, and citizens seem to have more confidence in civilian versus strictly internal review systems. Hing, *supra* note 45, at 798 (footnotes omitted).

58. See Tyre & Braunstein, *supra* note 38; see also PEREZ, *supra* note 15, at 139. In 1991, Berkeley, California's review board logged "the first instance of a higher rate of findings of misconduct from the civilian review process tha[n] this study has found in seventeen years of research. In other words, not at any time in the history of civilian review had a civilian system found the police guilty more often than had an internal system until Berkeley did so in 1991." PEREZ, *supra* note 15, at 139 (emphasis omitted).

problematic, these civilian boards may become weighed down by their own procedures and operate so inefficiently as to fail in their primary purpose.⁵⁹ Finally, the externality and independence of the review board, a valued characteristic when receiving and investigating complaints, may result in an institutional failure at the resolution stage of the process. Unless there is a process by which the status and disposition of complaints are reported to and considered by internal departments making personnel decisions, the impact of the process is diminished.⁶⁰

In sum, there is no clearly superior method to receive and resolve police misconduct complaints. Adopting any model poses challenges and pitfalls to municipal policymakers.⁶¹ While identifying the advantages and disadvantages of each model (informal, internal, or civilian) is useful, a municipality is also well-served by considering desirable goals for its complaint process.

A community's evaluation of its procedures for handling civilian complaints should recognize that receiving and resolving citizen complaints is integral to many law enforcement functions, and that the complaint process must serve those multiple purposes.⁶² First, the complaint process must deliver a fair and satisfactory result in an individual case. Obviously, this justice requirement is equally important to both the officer and the complainant. Second, receiving, investigating, and adjudicating complaints from citizens against officers are key aspects of departmental supervision of its officers. Often, the public has unique knowledge about the performance of officers in the field away from supervisory officers. Thus, in addition to providing a procedure that is fair to both aggrieved citizens and accused officers, receiving and adjudicating complaints is a component of personnel management and supervision of errant officers. The process provides an important mechanism to identify

59. See *Cox v. District of Columbia*, 821 F. Supp. 1 (D.D.C. 1993), *aff'd* 40 F.3d 475 (D.C. Cir. 1994); see also PEREZ, *supra* note 15, at 134 (discussing the delays in hearing and resolving complaints by civilian review board in Berkeley, California, noting the "negative impact on the effectiveness"; often the police chief has meted out punishment before the civilian process is concluded); Petterson, *supra* note 38, at 279-280.

60. See *infra* notes 208, 214-222 and accompanying text.

61. See *supra* note 46.

62. See Paul Hoffman, *The Feds, Lies, and Videotape: The Need For an Effective Federal Role in Controlling Police Abuse in Urban America*, 66 S. CAL. L. REV. 1453, 1481 (1993). The Christopher and Kolt reports, investigating abuses within the Los Angeles Police Department, demonstrated that despite a system to review and receive civilian complaints, the several dozen "bad" officers remained on the force and were even promoted: "the system was stacked against civilian complainants suggest[ing] department-wide indifference". *Id.*

officers who should be disciplined, transferred, retrained, demoted, or dismissed for misconduct. Third, the responsiveness of the department to citizen complaints gives civilians confidence that the department polices itself and does not hold itself above the law. This accountability function is important for the department in order to achieve and preserve the public confidence and legitimacy necessary to operate effectively as a police department. Finally, the receipt of citizen complaints, contextually, serves the department as an indicator of larger problems, such as problem officers, problem areas of training, and problem geographic areas with deficient supervisors. To that extent, complaints may reveal an organizational need for restructuring, reassessing, and changing.

Civil rights decisions against municipalities generally reflect a judicial expectation that civilian complaint procedures serve these important goals.⁶³ While courts have not weighed in on which model best achieves the important functions of a complaint review procedure, courts have articulated certain expectations regarding complaint procedures. Most importantly, decisions indicate that courts have embraced the basic premise that adequate complaint review is vital to a police department's supervisory responsibilities.

IV. Failure to Investigate Civilian Complaints of Police Misconduct as a Basis for Municipal Liability

A. Deliberate Indifference Claims

In *City of Canton v. Harris*,⁶⁴ the United States Supreme Court decided, in a failure-to-train case, that municipal liability could arise for a constitutional tort by an employee when an omission, such as the failure-to-properly-train an employee, amounted to deliberate indifference to the rights of persons with whom the police come in contact.⁶⁵ In *Canton*, plaintiff alleged that following her arrest, officers offered her no medical assistance despite severe emotional ailments that later required hospitalization and outpatient treatment.⁶⁶ She alleged that the City of Canton was culpable because it vested the discretion to determine the medical needs of detainees in the hands of supervisors who did not receive adequate training to assess those medical needs.⁶⁷ The Court was asked to determine both whether an otherwise constitutional policy (the

63. See generally *infra* Parts IV & V.

64. 489 U.S. 378 (1989).

65. See *id.* at 390-92.

66. See *id.* at 381.

67. See *id.* at 381-82.

city's policy of providing medical care for detainees)⁶⁸ could give rise to liability where the training to implement that policy was inadequate, and by what standard such inadequacy should be judged.⁶⁹

The *Canton* Court established that, in addition to liability for affirmative customs or policies under *Monell*, municipalities demonstrating deliberate indifference to training police officers could also be liable to citizens for constitutional deprivations caused by an otherwise constitutional policy.⁷⁰ The Court acknowledged that the City of Canton's policy that every jailor, with permission of the supervisor, could secure medical treatment for detainees, was undeniably a constitutional policy.⁷¹ Yet, the plaintiff claimed that if that policy was unconstitutionally applied by a municipal employee, the city could be liable.⁷² The Court agreed. In explaining the contours of this liability, however, the Court cautioned that "adequately trained officers occasionally make mistakes" and that no municipal liability would be imposed for such occasional mistakes.⁷³ In fact, the Court noted that such mistakes "say little about the training program or the legal basis for holding the city liable."⁷⁴ Therefore, the Court next asked, by what standard should municipal liability be judged to ensure that courts did not impose mere respondeat superior liability.⁷⁵

The first inquiry under *Canton* requires the court to examine the "adequacy of the training program in relation to the tasks the particular officers must perform."⁷⁶ The municipality must train its officers to "respond properly to the usual and recurring situations

68. See *id.* at 387; see also *Cox v. District of Columbia*, 821 F. Supp. 1, 12 (D.C. 1993) ("[i]n addition to concluding that a policy of failing to take action could amount to a policy or custom, *City of Canton v. Harris* held for the first time that constitutional policies as well as unconstitutional policies could result in municipal liability. . . ."), *aff'd*, 40 F.3d 475 (1994).

69. *Canton*, 489 U.S. at 385.

70. See Michael T. Burke & Patricia A. Burton, *Defining the Contours of Municipal Liability Under 42 U.S.C. § 1983: Monell Through City of Canton v. Harris*, 18 STETSON L. REV. 511 (1989) (explaining that municipal liability is fault-based); Anthony D. Schroeder, Note, *City of Canton v. Harris: The Deliberate Indifference Standard in 42 U.S.C. § 1983 Municipal Liability Failure to Train Cases*, 22 U. TOL. L. REV. 107, 111 n.31 (1990).

71. See *Canton*, 489 U.S. at 386.

72. See *id.* at 387.

73. *Id.* at 391.

74. *Id.*

75. See *id.* at 391-92.

76. *Id.* at 390.

with which they must deal.”⁷⁷ The Court made clear that municipalities would not be liable for failing to anticipate extraordinary events requiring special training. The Court also expressed tolerance for some failures in police training: “[t]hat a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city, for the officer’s shortcomings may have resulted from factors other than a faulty training program.”⁷⁸ In summing up the claimant’s burden to prove the inadequacy, the Court explained that a municipality would be liable only where the inadequacy was “likely to result in the violation of constitutional rights.”⁷⁹

Second, the claimant must demonstrate the municipality’s culpable deliberateness. Determining deliberate indifference demands exploring policymakers’ deliberative, decision-making process⁸⁰ when developing training programs. The Court explained that policymakers demonstrate “deliberate indifference,” a standard which the Court characterized as higher than either negligence or gross negligence, to the civil rights of claimants when they make a “conscious” or “deliberate choice to follow a course of action . . . from among various alternatives.”⁸¹ As to the deliberative process, the Court framed the inquiry as whether:

[I]n light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.⁸²

The Court also required proof that the municipality’s inadequate training actually caused the injury.⁸³ The Court explained that “the identified deficiency in a city’s training program must be closely related to the ultimate injury.”⁸⁴ *Canton* calls upon the jury to an-

77. *Id.* at 391.

78. *Id.* at 390.

79. *Id.* at 390.

80. *See City of St. Louis v. Praprotnik*, 485 U.S. 112, 129 (1988) (holding that policy must be furthered by those with final policymaking authority); *see also* Schroeder, *supra* note 70, at 127.

81. *Canton*, 489 U.S. at 389 (quoting *Pembaur v. Cincinnati*, 475 U.S. 469, 483-84 (1986) (plurality) (Brennan, J., concurring)).

82. *Id.* at 390.

83. *See id.* at 391.

84. *Id.*; *accord Walker v. City of New York*, 974 F.2d 293 (2d Cir. 1992) (holding that plaintiff must prove policymaker “knows to a moral certainty” that officers will confront such a situation and that lack of training will frequently lead officers to make the wrong choice); *see also* Schroeder, *supra* note 70, at 128.

swer the question, "[w]ould the injury have been avoided . . . [if] the program . . . was not deficient in the identified respect."⁸⁵ This close causal relationship necessitates proof that adequately trained officers would have responded differently to the situation.

Canton, therefore, requires a precisely drawn accusation of the deliberate indifference of a municipality.⁸⁶ It is not enough under *Canton* that the department's training program is inadequate. The plaintiff must demonstrate that the inadequacy actually caused a constitutional violation, that the inadequacy was the result of a deliberate choice by a policymaker, and that the likelihood the choice would lead to injury was obvious in light of the usual and recurring tasks to which an officer is assigned.⁸⁷ The narrowly-crafted allegation requirement generally assures municipalities that police forces with recruitment, training, and supervision practices reflecting policy choices consistent with national standards should be fairly insulated from claims except for very specific weaknesses.⁸⁸

Lower courts instantly extended *Canton* beyond failure-to-train claims to claims based upon a municipality's inadequate system of hiring, supervising, or reviewing police misconduct.⁸⁹ When challenging the adequacy of citizen complaint procedures, plaintiffs typically allege that the failure to institute an adequate system to receive, investigate, and resolve citizen complaints against police

85. *Canton*, 489 U.S. at 391.

86. *See id.* at 388-89.

87. *See, e.g.*, *Kerr v. City of West Palm Beach*, 875 F.2d 1546 (11th Cir. 1989) (city's failure to require continual and rigorous canine unit training caused injury to suspects apprehended by canines); *Parker v. District of Columbia*, 850 F.2d 708 (D.C. Cir. 1988) (deficient extra-jurisdictional arrest procedure training and physical fitness training), *cert. denied*, 489 U.S. 1065 (1989).

88. *See Bordanaro v. McLeod*, 871 F.2d 1151, 1162-63 (1st Cir.) ("The absence of a strictly enforced disciplinary system led the officers . . . to believe they were above the law and would not be sanctioned for their misconduct. A sufficiently supervised, properly recruited, trained and disciplined group of officers would not have acted so far below the level of accepted police behavior."), *cert. denied*, 493 U.S. 820 (1989); *cf. Rizzo v. Goode*, 423 U.S. 362, 378-80 (1975) (denying injunctive relief; federal courts are ill suited to second guess municipalities implementing police programs).

89. *Canton* implied that the deliberate indifference standard presumably applies to failure to act cases besides failure-to-train where inaction is a moving force behind constitutional injury. *Canton*, 489 U.S. at 394-95 (O'Connor, J., concurring) ("[W]here, as here, a claim of municipal liability is predicated upon a failure to act, the requisite degree of fault must be shown by proof of a background of events and circumstances which establish that the 'policy of inaction' is the functional equivalent of a decision by the city itself to violate the Constitution."). *Brown* confirmed the potential by considering deliberate indifference in the context of improper hiring. *See Brown*, 117 S. Ct. at 1390; *see also* Shari S. Weinman, Comment, *Supervisory Liability Under 42 U.S.C. Section 1983: Searching For The Deep Pocket*, 56 Mo. L. REV. 1041 (1991).

officers amounts to a policy of deliberate indifference to the need for police supervision. Plaintiffs further assert that the failure to investigate claims of misconduct or to discipline wrongdoers assures that similar misconduct will recur within a climate of lawlessness engendered by non-supervision.⁹⁰ Fitting the claim into *Canton's* test, one court has stated:

[A] city's complete failure to maintain an adequate system of disciplining officers who act unconstitutionally might also "fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury."⁹¹

Just as *Canton* requires the fact finder ultimately to ask whether a properly trained officer would have acted differently, these cases ask whether a more effective system to address citizen complaints would have prevented the officer from inflicting a constitutional injury upon the plaintiff. The necessary premise at the core of this claim is whether effective citizen complaint review would have led to better performance by the errant police officer. As the decided cases demonstrate, some courts eagerly have embraced that core premise:

[A]lthough [plaintiff] has not demonstrated that [deficiencies in the complaint process] actually encouraged additional misconduct or excessive force violations, the . . . inadequacies certainly did permit serious misconduct to go unchecked. In that sense, the District's policy "caused" or was a "substantial factor" in [plaintiff's] injuries. Logically, "continued official tolerance of repeated misconduct facilitates similar unlawful actions in the future."⁹²

The need to ask that core question in a narrow and case specific manner was reaffirmed in *Board of County Commissioners of Bry-*

90. See, e.g., *Fiacco v. City of Rensselaer*, 783 F.2d 319, 328 (2d Cir. 1986) ("[P]roof that other claims were met with indifference for their truth may be one way of satisfying the plaintiff's burden [to prove deliberate indifference]."), *cert. denied*, 480 U.S. 922 (1987); *Brown v. City of Margate*, 842 F. Supp. 515, 516 (S.D. Fla. 1993) ("[Plaintiff] argued that Margate police officers would use force with relative impunity, knowing that the City would not follow up on complaints and would not discipline or penalize officers for their excessive or unwarranted actions, and that this custom led to the incident in which [the plaintiff] was injured"), *aff'd*, 56 F.3d 1390 (11th Cir. 1995); *Sango v. City of New York*, 1989 WL 86995 (E.D.N.Y. 1989) (recognizing "proof of a policy of deliberate indifference based upon inadequate investigation of citizen complaints against police officers" is basis for § 1983 municipal claim).

91. *Cox*, 821 F. Supp. at 12.

92. *Cox*, 821 F. Supp. at 19 (quoting *Bielevicz v. Dubinon*, 915 F.2d 845, 851 (3d Cir. 1990) (internal citations omitted)).

ant County v. Brown,⁹³ decided in 1997. There, plaintiff Brown complained that her excessive force injuries at the hands of Deputy Sheriff Burns were a result of the county's failure to adequately screen Burns prior to appointment as a deputy. Plaintiff pointed to no general inadequacy in hiring officers. Rather, the apparent breakdown was the result of a familial relationship between the sheriff and the deputy. The primary issue for the Court involved whether proof of a "single incident" (the failure to screen a new hire's criminal record) by a policymaker (the Sheriff) was sufficient to establish deliberate indifference. Nevertheless, the Court's general comments about proving deliberate indifference claims are illuminating because they suggest that *Canton* has appropriate application beyond failure-to-train:

We concluded in *Canton* that an "inadequate training" claim could be the basis for § 1983 liability in "limited circumstances." We spoke, however, of a deficient training "program," necessarily intended to apply over time to multiple employees. Existence of a "program" makes proof of fault and causation at least possible in an inadequate training case. If a program does not prevent constitutional violations, municipal decisionmakers may eventually be put on notice that a new program is called for. Their continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequence of their action—the "deliberate indifference"—necessary to trigger municipal liability.⁹⁴

Thus, the Court agreed that deliberate indifference claims can extend beyond failure-to-train, at least to other "programs" marred by obvious deficiencies which cause constitutional injuries. However, the Court also acknowledged the difficulty of proving, outside of the failure-to-train context, the ultimate question posed by *Canton*: Would this officer have behaved differently if a proper program were in place? The Court expressed skepticism as to whether a plaintiff could prove that adequately screening applicants before hiring could predict a particular officer's future behavior, especially where the plaintiff proved only a single instance of neglectful hiring:

The proffered analogy between failure-to-train cases and inadequate screening cases is not persuasive. In leaving open in *Canton* the possibility that a plaintiff might succeed in carrying a

93. 117 S. Ct. 1382 (1997).

94. *Id.* at 1390.

failure-to-train claim without showing a pattern of constitutional violations, we simply hypothesized that, in a narrow range of circumstances, a violation of federal rights may be a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations.

....
Where a plaintiff presents a § 1983 claim premised upon the inadequacy of an official's review of a prospective applicant's record, however, there is a particular danger that a municipality will be held liable for an injury not directly caused by a deliberate action attributable to the municipality itself. . . . To prevent municipal liability for a hiring decision from collapsing into respondeat superior liability, a court must carefully test the link between the policymaker's inadequate decision and the particular injury alleged.⁹⁵

Importantly, the Court pointed out that inadequate training more predictably leads to injuries than does a hiring decision and that the causal link is therefore easier to prove in a training case. The decision alerts litigants that, outside of failure-to-train claims, proving causation between a municipal program and a constitutional injury may prove to be a steep hurdle.

Unlike the risk from a particular glaring omission in a training regimen, the risk from a single instance of inadequate screening of an applicant's background is not "obvious" in the abstract; rather, it depends upon the background of the applicant. A lack of scrutiny may increase the likelihood that an unfit officer will be hired, and that the unfit officer will, when placed in a particular position to affect the rights of citizens, act improperly. But that risk is only a generalized showing of risk.⁹⁶

The difficulty of linking a failure to adequately screen recruits with their future misconduct is not unlike the challenge before plaintiffs alleging that inadequate complaint review leads to continued misconduct. As the Court pointed out:

[A] finding of culpability simply cannot depend on the mere probability that any officer inadequately screened will inflict any constitutional injury. Rather, it must depend on a finding that this officer was highly likely to inflict the particular injury suffered by the plaintiff. The connection between the background of the particular applicant and the specific constitutional violation must be strong.⁹⁷

95. *Id.* at 1391.

96. *Id.*

97. *Id.* at 1392.

Analogously, to establish a claim that the deficient citizen grievance procedures resulted in injury, plaintiffs must prove that the inadequate procedures made it highly likely that the officer would inflict this constitutional harm upon the plaintiff.

Claimants rely upon one of three methods to prove that an officer would have behaved differently if a better system of citizen complaint review was in place. First, a plaintiff may attempt to prove that there is a "climate of lawlessness" within a police department and that misconduct by police officers generally goes unchecked.⁹⁸ Along with this method, a plaintiff must also prove that the particular officer-tortfeasor misbehaved because of this atmosphere.⁹⁹ Following *Brown*, this method of proof may be dubious.¹⁰⁰ A second method of proof is more direct. A plaintiff may attempt to prove that the particular officer, with a propensity toward misconduct as shown through prior incidents, misbehaved because that officer believed from past experience that nothing would happen.¹⁰¹ Finally, a plaintiff may attempt to prove that, had previous complaints against the officer been addressed at an earlier opportunity or more thoroughly, the officer likely would have been dismissed or disciplined before this incident.¹⁰²

Despite the rigorous requirements of proof, claims of deliberate indifference are no longer readily decided on the pleadings. In 1993, the Supreme Court rejected a heightened pleading standard for municipal claims in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*.¹⁰³ Resolving a split among the federal circuits, the Court in *Leatherman* reaffirmed its commitment to *Monell* causes of action by rejecting a heightened pleading standard for such claims. The Court, however, also signaled its expectation that poorly articulated claims should be disposed of at

98. See *infra* notes 108-31 and accompanying text (discussing *Fiacco v. Rennselaer*, 783 F.2d 319 (2d Cir. 1986)).

99. See *Fiacco*, 783 F.2d at 327.

100. See *infra* notes 130 & 152 and accompanying text for a discussion of pre-*Brown* analysis. As *Brown* explained, the court must "directly test the link between Burns' actual background and the risk that, if hired, he would use excessive force." *Brown*, 117 S. Ct. at 1392. Thus, "testing the link" requires plaintiff to prove that the municipality's indifference to complaints caused this officer to violate plaintiff's rights.

101. See *infra* notes 159-63 and accompanying text (discussing *Parrish v. Luckie*, 963 F.2d 201 (8th Cir. 1992)).

102. See *infra* notes 186-208 and accompanying text (discussing *Cox v. District of Columbia*, 821 F. Supp. 1 (D.D.C. 1993), *aff'd*, 40 F.3d 475 (D.C. Cir. 1994)).

103. 507 U.S. 163 (1993).

summary judgment.¹⁰⁴ Following *Leatherman*, municipalities must be prepared to defend their city programs, including complaint review systems, at summary judgment or trial. Early dismissal of these claims at the pleadings stage is now less likely.¹⁰⁵

B. Judicial Evaluation of the Complaint Review Process

1. Informal Complaint Review

While there are many variations, informal civilian complaint systems are typified by supervisory discretion. For example, citizen complaints initially may be received by the chief or town leader, assigned for investigation to other officers, and then finally referred to the chief for action.¹⁰⁶ The manner in which complaints are received, whether or not to conduct an investigation, the discipline, the reporting, and the monitoring may all be discretionary decisions by the police chief. Informal systems are as effective or ineffective as the person in charge. These systems often lack procedural safeguards for the accused and the accuser. They also fail to assign oversight and accountability roles to administrators. Thus, while an informal method of citizen complaint review may work effectively when a town has a conscientious police chief, the town has no institutional assurance that the system will work effectively.¹⁰⁷

The judicial message is unmistakeable with regard to informal systems: the town entrusting unfettered discretion to its police chief will be liable for its police chief's failings. *Fiacco v. Rensselaer*¹⁰⁸ was one of the first cases to hold that a failure to investigate prior complaints may evidence deliberate indifference. The case arose in the context of a relatively small town with informal complaint procedures. There, Mary Fiacco alleged that police used excessive force and caused her constitutional injury when she was

104. See *id.* at 168-69 (acknowledging an inundation of lawsuits and suggesting that summary judgment is the appropriate mechanism to "weed out unmeritorious claims sooner rather than later.").

105. See *Illiano v. Clay Township*, 892 F. Supp. 117 (E.D. Pa. 1995) (denying Clay Township's motion to dismiss); *Curran v. City of Boston*, 777 F. Supp. 116 (D. Mass. 1991) (denying Boston's motion to dismiss); *Vasquez v. Reid*, No. 90 C 1585, 1990 WL 207456 (N.D. Ill. Dec. 6, 1990) (denying Chicago's motion to dismiss); see also Eric Kugler, *A 1983 Hurdle: Filtering Meritless Civil Rights Litigation at the Pleading Stage*, 15 REV. LITIG. 551, 552-58 (1996).

106. See PEREZ, *supra* note 15, at 87-88.

107. See *id.*

108. 783 F.2d 319 (2d Cir. 1986), *cert. denied*, 480 U.S. 922 (1987). The case foreshadowed *Canton* and is cited with approval in *Canton* for the deliberate indifference standard. See *Canton*, 489 U.S. at 397.

arrested for disorderly conduct following a night of heavy drinking.¹⁰⁹ After passing out on the lawn of a Rensselaer, New York home she arrested and was brought to the police station.¹¹⁰ While exiting the patrol vehicle, she claimed she was “shoved,” “dragged,” “kicked,” and “poked” without provocation or justification by Officers Meyer and Harrington.¹¹¹ The plaintiff offered evidence that the Chief of Police had ignored prior instances of alleged brutality brought to his attention by civilians. Fiacco advanced the theory that the failure to exercise reasonable care in investigating prior complaints demonstrated deliberate indifference to police brutality and the municipality’s responsibility to supervise its officers.¹¹² She argued that this deliberate indifference allowed officers to injure plaintiff.¹¹³ The Court of Appeals for the Second Circuit affirmed a jury verdict in favor of Fiacco against Rensselaer.¹¹⁴ The court approved Fiacco’s theory of how municipal indifference to complaints demonstrated failure to supervise and resulted in her injury:

Fiacco’s theory is not that the City intended to engage in unintentional conduct. Rather it is that the City was knowingly and deliberately indifferent to the possibility that its police officers were wont to use excessive force and that this indifference was demonstrated by the failure of the City defendants to exercise reasonable care in investigating claims of police brutality in order to supervise the officers in the proper use of force. We see no logical flaw in such a hypothesis. . . .¹¹⁵

The court was satisfied that this failure to supervise resulted in unchecked abuse and made Fiacco’s injuries likely.”

Fiacco also addressed the admissibility of unsustained and unproven complaints as evidence of inadequate supervision. In reviewing the proceedings below, the Second Circuit agreed with the

109. See *Fiacco*, 783 F.2d at 321.

110. See *id.*

111. *Id.*

112. See *id.* at 323.

113. See *id.*

114. Compare *id.* with *Andrews v. Fowler*, 98 F.3d 1069, 1075 (8th Cir. 1996) (describing situation in which mayor and city council members took immediate action upon learning of misconduct), and *Sharrar v. Felsing*, No. Civ. A. 94-1878, 1996 WL 117162, * 18 (D. N.J. March 7, 1996) (holding on summary judgment, town with only twenty police officers not liable for failure to have an internal affairs department or other formal complaint mechanisms in place), and *York v. City of San Pablo*, 626 F. Supp. 34 (N.D. Cal. 1985) (finding no municipal liability in case of six complaints of excessive force insufficient where complaints were all investigated by the city).

115. *Fiacco*, 783 F.2d at 326.

trial judge that the probative value of unproven third party complaints of misconduct outweighed their prejudicial value.¹¹⁶ As the court explained, evidence that past complaints had not been investigated proved Fiacco's theory of deliberate indifference.¹¹⁷ "[I]f the City's efforts to evaluate the claims were so superficial as to suggest that its official attitude was one of indifference to the truth of the claim, such an attitude would bespeak an indifference to the rights asserted in those claims."¹¹⁸ By alleging that a failure to investigate past complaints amounted to deliberate indifference rather than a pattern of widespread abuse, the plaintiff overcame a substantial obstacle. To prove a pattern of abuse, unfounded complaints are not relevant.¹¹⁹ However, to prove a climate of lawlessness due to a lack of supervision, the response to any complaint is relevant.¹²⁰

Having determined that unproven claims were admissible, the court then examined the town's response to complaints and the sufficiency of the plaintiff's evidence.¹²¹ Although Rensselaer's town charter called for a Public Safety Board to supervise the po-

116. See *id.* at 327-28.

117. See *id.* at 328 ("[w]hether or not the claims had validity, the very assertion of a number of such claims put the City on notice. . ."); see also *Beck*, 89 F.3d at 975 (holding that evidence of unproven complaints is admissible when allegation is that the grievance process is inadequate).

118. *Fiacco*, 783 F. 2d at 328.

119. The mere number of complaints (whether sustained or not), seems dubious proof of a widespread practice, even in a small community. See *Kerr v. City of West Palm Beach*, 875 F.2d 1546, 1555 (11th Cir. 1989) (comparing injury rate within canine units of other municipalities); *Sarus v. Rotundo*, 831 F.2d 397, 401 (2d Cir. 1987) (holding that no unconstitutional practice was shown by number of complaints); *Bryant v. Whalen*, 759 F. Supp. 410, 412 (N.D. Ill. 1991) (statistical evidence of complaint/sustained rate in Chicago is not sufficient); *Burnette v. Ciolino*, 750 F. Supp. 1562, 1564-65 (M.D. Fla. 1990) (plaintiff bears burden of demonstrating a "history of widespread abuse" and summary judgment is appropriate where plaintiff points to five shootings in five years); *McKenna v. County of Clayton*, 657 F. Supp. 221, 225 (N.D. Ga. 1987) ("The mere existence" of "common occurrences" such as previous false arrest claims does not establish a failure to adequately investigate unless the plaintiff shows they were resolved against the employer on the merits).

120.

The jury was instructed that there had never been any authoritative finding as to whether or not any claimant's charge was valid and that the jury was neither to assume that the claims were true nor to try to assess their truth; rather, the jury was merely to "focus [its] attention on [whether] the chief of police and/or the city [took] sufficient steps in their supervisory capacity in handling those claims."

Fiacco, 783 F.2d at 328; see also *Sango v. City of New York*, No. 83 CV 5177, 1989 WL 86995, *10 (E.D.N.Y. July 25, 1989) (holding that adjudicated complaints are relevant to question of adequacy of the proceedings).

121. See *Fiacco*, 783 F.2d at 328.

lice department, and the town had adopted rules to govern the department and discipline officers, Police Chief Stark had never seen those rules.¹²² The Board provided no form on which a civilian could file a complaint against an officer.¹²³ Fiacco offered evidence that seven written complaints had been filed with Chief Stark, that the police chief typically took no written statements from the complainants, that he did not open any formal investigation, and that he did not make any notations in officer files concerning the complaints.¹²⁴ No hearings had ever been held.¹²⁵ Instead, the chief testified that "he had conducted as much investigation as he thought necessary."¹²⁶

The chief testified that there had been other complaints against officers and, after investigating those complaints he discharged three officers.¹²⁷ Rensselaer attempted to show through this evidence that its informal investigation and discipline process was adequate and resulted in appropriate discipline. The court, however, found the informal process completely inadequate. Rensselaer's problems were compounded by the mayor's lack of response. While the mayor was informed of all complaints, he condoned the failure to prepare formal reports or submit the complaints to the Public Safety Board.¹²⁸ Thus, rather than a negligently administered program, the policymakers for the town deliberately ignored the town's duly enacted citizen complaint procedure. Rejecting Rensselaer's defense of its informal process, the court concluded that, "the evidence was sufficient as a matter of law to permit a rational juror to find that the City had a policy of nonsupervision of its police officers that amounted to a deliberate indifference to their use of excessive force."¹²⁹

Plaintiff's causation evidence was not particularly well-defined, most likely because the case was decided before the edicts of *Canton* and *Brown* that plaintiffs must establish and test the affirmative link between the misconduct and the municipality's indifference. However, plaintiff did establish that at least one of the misbehaving officers was the subject of previous complaints. In addition, because of the informality of the complaint process, little or no inves-

122. *See id.* at 329.

123. *See id.*

124. *See id.* at 329-30.

125. *See id.* at 330.

126. *Id.*

127. *See id.* at 331.

128. *See id.*

129. *Id.* at 332.

tigation of the officer's past misconduct occurred. The officer was also promoted to sergeant without past claims being fully investigated or adjudicated. It seems likely, therefore, that even after *Canton* and *Brown*, *Fiacco's* evidence "directly tested the link between" the deficiencies in the complaint system and the misconduct of that officer.¹³⁰ The court concluded that a jury rationally could have inferred that:

[w]ith no formal statement being taken from the complainant, no file being created, no notation being made in the officer's file, and no further investigation being made—[the process] would have been viewed by the officers, and should be viewed by an objective observer, as reflecting indifference by the City to the use of excessive force.¹³¹

Fiacco proved that an inadequate system for responding to citizen grievances promoted a climate of unconstitutional misconduct as well as an inference that this lawless climate was affirmatively linked to the misconduct at issue.

An informal complaint review procedure also failed the citizens of Utica, New York. The court's particular criticisms regarding Utica are noteworthy and instructive.¹³² In *Hogan v. Franco*,¹³³ a claim for excessive force was made against several Utica officers following the plaintiff's arrest when he resisted officers attempting to confiscate his alcohol at a public fireworks display.¹³⁴ Arresting officers beat the plaintiff with a baton and refused to grant medical attention until the next day despite pleas from other arrestees on his behalf.¹³⁵ As one basis of municipal liability, plaintiff alleged

130. *Brown*, 117 S. Ct. at 1392.

131. *Fiacco*, 783 F.2d at 331.

132. An earlier case against Utica found no liability. In *Sarus v. Rotundo*, 831 F.2d 397 (2d Cir. 1987), the Second Circuit Court of Appeals reversed a jury verdict against Utica. The court noted multiple avenues to complain about police (the mayor, the Public Safety Commission, and the chief) although complaints eventually funneled to the chief. Importantly, Chief Rotundo testified that he routinely disciplined based upon investigations. *Id.* at 401. The court cautioned, "[w]hile a more formal process might be preferred, appellees offered no evidence that the Utica procedures differed in any way from those employed by other municipalities." *Id.* Although decided before *Canton*, the court followed the deliberate indifference standard, relying on *Fiacco*. *Id.* Put in the context of *Canton*, the claim in *Sarus* apparently failed because plaintiff failed to prove that the informal complaint review procedure in Utica was deficient and the need for formality obvious. *Canton*, 489 U.S. at 390.

133. See *Sarus*, 896 F. Supp. 1313 (N.D.N.Y. 1995). The *Sarus* claim arose from events in 1984. 831 F.2d at 398. The *Hogan* injuries occurred in 1992. See *Hogan*, 896 F. Supp. at 1316.

134. See *Hogan*, 896 F. Supp. at 1316.

135. See *id.*

that Utica's general failure to investigate citizen complaints evidenced deliberate indifference amounting to a policy or practice of failing to properly supervise or discipline officers.¹³⁶ Equipped with detailed information about supervision in Utica and a cogent theory, the court examined Utica's system for reviewing citizen complaints.¹³⁷

The court agreed with the plaintiff that the failure to institute adequate civilian complaint procedures was evidence of inadequate supervision and could lead to injuries such as the excessive force injuries he suffered.¹³⁸ As to the complaint process specifically, the *Hogan* court first faulted the manner in which past complaints were investigated and resolved.¹³⁹ In contrast to testimony in an earlier case,¹⁴⁰ where Police Chief Rotundo testified to "previous disciplinary actions and a system of handling complaints that did not give him sole discretion[,]"¹⁴¹ in *Hogan*, he testified that: "the police department has no formal procedures for handling complaints of police brutality; . . . the police department does not index such complaints; . . . informal investigations are conducted by fellow officers. . . ."¹⁴² at the discretion of the chief.¹⁴³ The court found that the investigation of the *Hogan* incident evidenced "purposeful intolerance" from a department which "arrogantly refused to search for answers, accepted without question denials by involved officers, and concluded that the claims were not only un-

136. See *id.* at 1318. In addition to excessive force by beating, Hogan also complained that being jostled in the back of the van while handcuffed and unable to stabilize himself amounted to excessive force, and deliberate indifference to medical needs. He also prevailed on a claim that the failure-to-train drivers to secure prisoners against injury in the vans, that the failure to provide medical attention, and the failure-to-train officers in use of force each constituted deliberate indifference. See *id.* at 1316, 1322, 1323.

137. The court applied *Walker v. City of New York*, 974 F.2d 293 (2d Cir. 1992), *cert. denied*, 507 U.S. 961 (1993), requiring conscious indifference of policymakers to the inadequacy of the program. In this failure-to-train case, the court required plaintiff to prove that a policymaker "knows to a moral certainty" officers will confront a given situation and that the failure-to-train will frequently lead officers making the wrong choice and to a deprivation of civil rights. *Hogan*, 896 F. Supp. at 1321 (quoting *Walker*, 974 F.2d at 297).

138. See *Hogan*, 896 F. Supp. at 1323.

139. *Id.* at 1320 ("Trial testimony indicated that the informal investigation procedures consisted of a supervising officer asking the officer who was the subject of the complaint to submit a statement on special report Utica Police Department Form 61.").

140. See *Sarus v. Rotundo*, 831 F.2d 397 (2d Cir. 1987).

141. See *Hogan*, 896 F. Supp. at 1323.

142. *Id.* at 1317.

143. See *id.* at 1323.

resolved, but unsubstantiated.”¹⁴⁴ From the court’s perspective, the complaint review process had deteriorated from the earlier case: “[c]ontrary to the situation in *Sarus*, there is no longer a Public Safety Commissioner to handle citizen complaints or to introduce new police policy. . . . Chief Rotunda is now responsible for the supervision of the police, and the informal investigation described above is the result.”¹⁴⁵

The court faulted Utica’s failure to index the complaints by officers’ names or to place them in officers’ personnel files even when unsubstantiated.¹⁴⁶ The court noted that indexing complaints is recommended by the New York State Commission on Criminal Justice and the Use of Force and that “lack of indexing may be a factor of inadequate supervision if supported by other evidence.”¹⁴⁷ The court criticized Utica’s maintenance of complaints in alphabetical order by complainant. While the process protected an officer’s personnel file from the “smear” of “unsubstantiated complaints,” the court explained that this indicated “silent support and protection,” a “lack of supervision,” and “deliberate indifference to the truth.”¹⁴⁸

144. *Id.* at 1320.

145. *Id.* at 1323. No mention was made of whether the other sources investigating complaints in Utica remained intact. *See Brown v. City of Margate*, 842 F. Supp. 515 (S.D. Fl. 1993) (holding that informal resolution of complaints without written documentation is sufficient to establish deliberate indifference).

146. *See Hogan*, 896 F. Supp. at 1320; *infra* note 147. Regardless of the complaint review system employed, record keeping policies may raise issues of inadequacy. *Compare Brown*, 842 F. Supp. at 516 n.2 (“The City must, however, acknowledge that allegations of a police department’s failure to maintain thorough and accurate records of citizen complaints—if substantiated—could be considered evidence of deliberate indifference.”) with *Bosley v. Foster*, No. Civ. A. 90-2409-L, 1992 WL 40696, at *2 (D. Kan. Feb. 5, 1992) (holding that the destruction of records of unfounded complaints after six months, well-founded claims after two year statute of limitations is not an unconstitutional policy, nor can plaintiff establish an affirmative link between destruction and injury suffered).

147. *Hogan*, 896 F. Supp. at 1324. *Hogan* is not alone in criticizing the failure to index pending and even unsustained complaints. Other courts have complained that the failure to place pending or unsustained complaints in an officer’s personnel record or to otherwise track and monitor them prevents the municipality from recognizing early patterns of abuse. *See, e.g., Beck v. City of Pittsburgh*, 89 F.3d 966, 973 (3d Cir. 1996) (reversing judgment in favor of Pittsburgh: “each complaint was insulated from other prior and similar complaints and treated in a vacuum”); *Vann v. City of New York*, 72 F.3d 1040, 1045 (2d Cir. 1995); *Cox v. District of Columbia*, 821 F. Supp. 1, 15 (D.D.C. 1993), *aff’d*, 40 F.3d 475 (D.C. Cir. 1994). *But see Brooks v. Scheib*, 813 F.2d 1191, 1194 (11th Cir. 1987) (holding that court will not mandate policy requiring examination of prior complaints).

148. *Hogan*, 896 F. Supp. at 1319-21.

Utica's informal complaint system, evidence of the inadequacy of the investigation in plaintiff's own case, the town's failure to index complaints and anecdotal evidence¹⁴⁹ of alleged past misconduct were sufficient evidence of deliberate indifference to support municipal liability.¹⁵⁰ The systematic failure to investigate prior complaints convinced the court that: "[t]he inference that a policy existed may . . . be drawn from circumstantial proof, such as . . . evidence that the municipality had notice of but repeatedly failed to make any meaningful investigation into charges that police officers had used excessive force in violation of the complainants' civil rights."¹⁵¹

This case suggests that courts may be willing to infer that prior complaints, without regard to their validity, coupled with a faulty system of investigation, suffice to prove a municipality's failure to supervise police officers.

Like *Fiacco*, *Hogan* also lacked direct evidence by which to answer the question, "would the injury have been avoided . . . [if] the program . . . was not deficient in the identified respect[?]"¹⁵² Instead, the court concluded the jury could infer that the injury was a consequence of failing to supervise:

Regardless of whether the investigation would find [the police officers] responsible for the assault upon Hogan, its undertaking was necessary to convey a policy strongly discouraging such acts. Yet policymaking personnel accomplished exactly the opposite, conveying a strong statement of support for civil rights violations by their tolerance of these violations. Their refusal to root out the culprits . . . issues a shout of support for such actions without a word spoken.¹⁵³

149. The court credited the testimony of other victims of alleged abuse and an emergency room physician who claimed to have treated victims of past abuse. "The evidence introduced was sufficient to show a problematic number and regularity of complaints. . . ." *Id.* at 1324.

150. *See id.* The court makes no mention of sustained complaints or proven incidents of past misconduct, an element the *Sarus* court found critical. *See Sarus*, 831 F.2d at 397, 402 (finding no evidence of past incidents "viewed as essential in *Fiacco*" and court was "loath to affirm a finding of a policy of indifference when not even a single incident of other misconduct was presented"). However, the *Hogan* court apparently dismissed the need for proof of prior misconduct, implying that because of inferior investigation of citizen complaints one could not infer a lack of prior misconduct. *See Hogan*, 896 F. Supp. at 1325.

151. *Hogan*, 896 F. Supp. at 1320 (quoting *Ricciuti v. New York City Transit Auth.*, 941 F.2d 119, 123 (2d Cir. 1991) (omission in original)).

152. *Canton v. Harris*, 489 U.S. 378, 391 (1989).

153. *Hogan*, 896 F. Supp. at 1320.

Like Fiacco, Hogan used proof of a climate of lawlessness to create the inference that the system's failure caused the instant injury.

Other lessons can be drawn from *Fiacco* and *Hogan*. These cases demonstrate a dissatisfaction with informal complaint systems in which the responsibility for receiving and investigating complaints resides with an individual vested with unbridled discretion to pursue complaints or not. These communities pay the price for the judicially perceived shortcomings of their chief of police.¹⁵⁴

Hogan also foreshadows an emerging judicial expectation: all complaints (not merely sustained complaints) against officers should be indexed and noted in officer personnel files so that repeated complaints yield data about an officer's overall performance. While each misconduct complaint may be judged in the vacuum of impartiality, an officer's overall performance must be judged in the context of his or her past performance.¹⁵⁵ Experts suggest that multiple complaints, regardless of the adjudicatory outcome, may suggest officers require additional supervision, monitoring, or retraining.¹⁵⁶ Thus, courts expect that the system will potentially identify problem officers from patterns of past complaints and act to protect the public.

2. Internal Affairs

Police departments employing internal affairs units to investigate civilian complaints are subject to criticisms that the internal investigations are perfunctory or biased, especially when a police chief directly supervises the investigators or affords them little independence.¹⁵⁷ Moreover, lodging complaints against police to the police

154. See e.g., *Carney v. White*, 843 F. Supp. 462 (E.D. Wis. 1994) (holding that Village of Darien may be liable where police committee did not monitor the internal complaint process), *aff'd*, 60 F.3d 1273 (7th Cir. 1995); *Brown v. City of Margate*, 842 F. Supp. 515, 518 (S.D. Fla. 1993) ("The City admitted that prior to 1988 citizen complaints were routinely disposed of orally with no record kept of the complaint nor any documentation made of any investigation that was conducted."), *aff'd*, 56 F.3d 1390 (11th Cir. 1995). An informal system may be successfully defended, however, when the policymakers are responsive. See *Andrews v. Fowler*, 98 F.3d 1069, 1074 (8th Cir. 1996) (describing case in which police chief brought misconduct to the attention of the city council promptly and requested immediate termination; three prior incidents were also met with swift termination).

155. See *supra* note 147 and accompanying text.

156. See *infra* note 232 and accompanying text.

157. See Alison Patton, *The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 Is Ineffective in Deterring Police Brutality*, 44 HASTINGS L.J. 753, 794 (1993) (discussing internal affairs investigations posing a serious potential for bias, cover-up and unfairness).

department itself may be viewed as intimidating by the public.¹⁵⁸ Without a nondepartmental unit for receiving citizen complaints, internal affairs systems are subject to allegations that they actively discourage complainants from coming forward through threats, intimidation, and reprisals. If a system discourages complaints by fostering fear, the system is patently deficient.

*Parrish v. Luckie*¹⁵⁹ is notable both for its assessment of the internal affairs complaint system and the direct link plaintiff proved between the municipality's non-supervision *vis-a-vis* its defective complaint procedures and the particular injury suffered. The Eighth Circuit Court of Appeals affirmed a verdict in favor of plaintiff Parrish for false arrest and sexual assault against the City of North Little Rock, Arkansas. Following her arrest, Ms. Parrish was forced to perform oral sex on the arresting officer, Luckie.¹⁶⁰ She complained to Officer Dallas about Luckie. Dallas in turn reported back to Luckie. Luckie told Dallas "not to report the incident to his supervisor because he knew that if a written complaint was not filed, the Department would not investigate."¹⁶¹ There was evidence of prior incidents of misconduct involving Luckie.¹⁶² The plaintiff did file a written report about the incident and Luckie was eventually charged and convicted of first degree sexual abuse.¹⁶³

As to the deficiencies in the complaint system, the court agreed with the jury's conclusion that the police department under the direction of its police chief "implemented a policy of avoiding, ignoring, and covering up complaints of physical and sexual abuse."¹⁶⁴ The internal affairs division in North Little Rock did not select cases for investigation independently but was solely controlled by the chief:

Chief Bruce created and maintained a system in which he was the only person who could open an internal affairs investigation. Chief Bruce maintained a policy of opening investigations only when citizens filed written complaints. After Chief Bruce opened an investigation, he controlled its scope and direction. Investigators would report to Chief Bruce as to whether the written complaint was substantiated or unsubstantiated.

158. See *infra* note 166.

159. 963 F.2d 201 (8th Cir. 1992).

160. See *id.* at 203.

161. *Id.*

162. See *id.* at 204.

163. See *id.*

164. *Id.* at 203.

.....
Evidence also showed that the Department required citizens filing written complaints against officers to submit a statement under oath and to sign a statement that they understood Arkansas' felony statute regarding false swearing. Investigators also discouraged citizens from filing complaints by telling persons that if the investigator believed they were not telling the truth, they might be prosecuted and fined or imprisoned.¹⁶⁵

The court agreed with the plaintiff that this internal affairs procedure intimidated citizens and made them reluctant to file complaints.¹⁶⁶ Therefore, the absence of complaints did not indicate an absence of misconduct within the force. Instead, the court inferred that officers operating under this system could "act with impunity unless a citizen filed a written complaint."¹⁶⁷

Most importantly, *Parrish* demonstrates an effective method to prove that the municipality's faulty complaint review system directly permitted a particular officer to violate a citizen's constitutional rights. Here, evidence showed that Officer Luckie knew that if he could convince fellow officers not to file written reports, and could intimidate complainants from coming forward, he could escape investigation and discipline. Thus, the inadequacy of the complaint process allowed Luckie repeatedly to violate the constitution, and Luckie was aware of the lack of consequences for misconduct. The affirmative link, required by *Brown* and *Canton*, was quite strong.

165. *Id.* at 204-205. This is not an uncommon procedure. Regardless of the system, the hope is that sworn complaints curb false complaints, however, the procedure may also discourage valid ones:

Civilian review boards have varying procedures, some of which are subject to the same criticisms as are police investigatory process. For example, a body calling itself a "civilian review board" in Richmond, California, requires complainants to sign complaints and gives a stern warning about the prosecution of false statements. Not unlike the police officers' bill of rights in Maryland, this procedure can be criticized on the grounds that it is intimidating to citizens. It quashes one of the arguments put forth historically in favor of civilian review.

PEREZ, *supra* note 15, at 130.

166. The fear of complaining is particularly problematic to internal complaint models. See *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 565 (1st Cir. 1989) ("The investigations of complaints against officers required witnesses to come to the station house to give sworn written statements. . . . [T]he effect of such a requirement was to 'frighten[] most of the average citizen[s] This hampered the department's ability to discover the truth surrounding alleged incidents of misconduct.") However, as Perez notes, civilian review can apply similarly stifling requirements. PEREZ, *supra* note 15, at 130.

167. *Parrish*, 963 F.2d at 205.

Nonetheless, an internal affairs system is not a necessarily fatal choice leading inevitably to municipal liability. In *Brooks v. Scheib*,¹⁶⁸ the plaintiff alleged a constitutional injury against an Atlanta police officer and also complained that the city failed to supervise its officers adequately, specifically attacking the internal citizen complaint review process.¹⁶⁹ The Eleventh Circuit Court of Appeals reversed a jury verdict against Atlanta, finding plaintiff's evidence insufficient to support the verdict.¹⁷⁰ As to the plaintiff's "complain[t] about the failure to have a citizens' review committee or other outside involvement in the complaint process,"¹⁷¹ the court explained that the plaintiff lacked evidence that "police officers cannot be fair and objective in judging complaints against other officers."¹⁷² Unlike in *Parrish*, the *Brooks* plaintiff offered no evidence to show that the police actively discouraged complainants from making complaints or that the police chief exercised unilateral control over the investigation.

Brooks also asserted that the large number of complaints against the officer involved demonstrated Atlanta's deliberate indifference, even if some of those complaints were pending or unsustainable.¹⁷³ The court rejected this contention. It held that it was improper for the jury to infer that the city had knowledge of misconduct from the number of complaints alone.¹⁷⁴ After all, the court explained, the officer worked in a high crime area where arrestees frequently complain "as a means of harassing officers who arrest them."¹⁷⁵ As to the failure to index complaints by officer name, the court commented that while such a practice might be

168. 813 F.2d 1191 (11th Cir. 1987).

169. See *id.* at 1193. Plaintiff pointed to three specific deficiencies with regard to the internal complaint process: 1) the failure to have a written policy requiring that past complaints be brought to the attention of investigators of fresh complaints; 2) failure to administer polygraphs to officers involved in complaints; 3) failure to have a policy giving citizens a role in the complaint review process. See *id.* at 1194.

170. See *id.* at 1195.

171. *Id.* at 1194.

172. *Id.* at 1194; see also Perez, *supra* note 15, at 115.

173. See *Brooks*, 813 F.2d at 1194. Perez reports that most police receive one or fewer complaints per year and that a typical officer receives between two and four complaints over their career. See PEREZ, *supra* note 15, at 29.

174. See *id.* at 1193 ("City presented testimony that each complaint was fully investigated and found to be lacking in merit"). Perez cautions that errant officers do not necessarily receive the most complaints, "these ideas do not square with the realities of the reports of police misconduct . . . [i]ndividual patterns and career histories are far more complex than such simple analysis implies." PEREZ, *supra* note 15, at 30.

175. *Id.* at 1193; see also Beck v. City of Pittsburgh, 89 F.3d 966, 975 (quoting Straus v. City of Chicago, 760 F.2d 765, 768-69 (7th Cir. 1985) (stating that people file complaints against the police "for many reasons, or for no reason at all")).

helpful, it would not "mandate a policy which would require that prior complaints always be examined."¹⁷⁶ The court recognized that Atlanta might be liable if the plaintiff could prove "that more effective citizens' complaint procedures would have prevented his injuries."¹⁷⁷ However, plaintiff failed to do so.

Proving internal systems lack legitimacy and integrity requires more than vague inferences that the system is necessarily biased merely because it is an internal system.¹⁷⁸ *Canton* requires far more.¹⁷⁹ Over eighty percent of municipal police departments rely on an internal affairs model to review citizen complaints.¹⁸⁰ In *Parrish*, the plaintiff provided a narrowly-crafted allegation that the internal affairs system actively discouraged complainants from coming forward and that complaints received only cursory investigation in a system designed to cover up more than it revealed. Moreover, *Parrish* proved that the faulty system was a likely factor in Officer Luckie's tendency toward misconduct based on a review of Luckie's past record.

The perceived lack of integrity and legitimacy¹⁸¹ within informal and internal affairs systems may lead judges and juries to infer that misconduct within a department likely goes unchecked. Yet *Brooks* demonstrates that a plaintiff must muster more than a mere inference of bias to prove deliberate indifference.¹⁸²

3. Civilian Review Procedures

Participation by civilians in the review of complaints against police may eliminate the perception that investigations are biased and self-serving. Chief among the strengths of civilian review are perceptions of independence and integrity. Although the perception

176. *Brooks*, 813 F.2d at 1194; see *supra* note 147 and accompanying text.

177. *Brooks*, 813 F.2d at 1195. *Brooks* is notable because it is one of few decisions expressing skepticism concerning the "provability" of a narrowly crafted allegation that a defective complaint procedure caused a constitutional injury, recognizing *Harris's* edict not to second-guess communities. *Id.* at 1194.

178. See *PEREZ*, *supra* note 15, at 114-115 (stating that internal affairs can be "extremely effective in influencing police behavior" and "clean[ing] house").

179. See *Chudzik v. City of Wilmington*, 809 F. Supp. 1142, 1149 (D. Del. 1992) (holding that "sweeping" generalizations that internal affairs system is inadequate is insufficient to oppose summary judgment—plaintiff, as a complaining witness at internal affairs hearing, was permitted opportunity to witness hearing but not to confront witnesses or be represented by counsel).

180. See *supra* note 41.

181. See *PEREZ*, *supra* note 15.

182. See *id.* ("The classic internal review model is not at all as sinister as has been asserted by external observers. The deterrent effects of internal investigative mechanisms are significant.").

of integrity and legitimacy of investigations of citizen grievances against officers may be restored by independent civilian review,¹⁸³ such a system also raises efficiency problems. Further, if the civilian review process does not interface with other departments and have an impact on personnel decisions, then the review does not yield meaningful results. Communities transitioning to civilian review should find the District of Columbia's disastrous experience instructive.

The District of Columbia enjoyed an early litigation success following implementation of a civilian review board to hear citizen complaints against officers.¹⁸⁴ Its success was short-lived.¹⁸⁵ The failure to investigate citizen complaints and discipline officers as a species of failure to supervise was advanced a second time as a basis of municipal liability in *Cox v. District of Columbia*.¹⁸⁶ In *Cox*, the plaintiff alleged unconstitutional use of force by Officer Goodwin. Officer Goodwin had against him several prior complaints of excessive force. At least one of those incidents had occurred during his probationary service, when, had the complaint been decided against Goodwin, Goodwin could easily have been terminated.¹⁸⁷ However, the plaintiff was able to prove that, because of a woefully inadequate complaint review procedure, Officer Goodwin remained on the force while his conduct went unchecked and his probationary period on the force expired.

In most respects, the plaintiff's deliberate indifference claim was similar to *Fiacco's*: that the citizen review system was fundamentally flawed and that the resulting failure to discipline officers assured continued constitutional deprivations. *Cox* demonstrates that the case against a municipality can be proven in large cities as well as in small towns. As in *Fiacco*, not only did the plaintiff demonstrate that there were past complaints, but also that the mu-

183. See *id.* at 142-56.

184. Prior to 1982, citizen complaints were handled through an internal process. See *Cox v. District of Columbia*, 821 F. Supp. 1, 3 (D.D.C. 1993) (describing development of the Civilian Complaint Review Board), *aff'd*, 40 F.3d 475 (D.C. Cir. 1994).

185. In *Carter v. District of Columbia*, 795 F.2d 116 (D.C. Cir. 1986), a civil rights plaintiff offered a mixture of evidence to support a claim of a pattern of excessive force against the District of Columbia. The *Carter* plaintiff failed to adequately attack the procedure for reviewing complaints, instead attempting to show that the number of complaints and the sustained complaint rate was circumstantial evidence of a custom or policy of misconduct. A directed verdict was entered in favor of the municipality and the Court of Appeals for the District of Columbia affirmed. The court found that the statistics alone were "wanting in detail" and plaintiff lacked a cogent theory of the District's deficiencies. *Id.* at 122-5.

186. 821 F. Supp. 1 (D.D.C. 1993), *aff'd*, 40 F.3d 475 (D.C. Cir. 1994).

187. See *id.* at 9.

municipality did not have an effective system to address the complaints. Moreover, the plaintiff in *Cox* also showed that complaints against the police officer in question went unanswered and that he remained on the force while the complaints were languishing in the city's bureaucracy. As *Canton* and *Brown* demand, *Cox* also proved a link between the deficient program and the injury by demonstrating the officer continued in municipal service without discharge or discipline.

In *Cox*, the plaintiff offered evidence¹⁸⁸ that the District of Columbia's complaint review process for its Metropolitan Police Department was inadequate due to an ever-increasing backlog. For example, the plaintiff offered evidence that in 1983 the average time required to dispose of a complaint was eight months, but by 1990 the time had increased to 33.10 months.¹⁸⁹ The plaintiff demonstrated:

At the end of its first five years of existence, the CCRB [Civilian Complaint Review Board] had received a total of 1,742 complaints and had a backlog of approximately 1,000 cases. Of the 1,742 cases filed, the CCRB had made findings on the merits in only 145 cases, sustaining at least one allegation of misconduct in 65 of those 145 cases.¹⁹⁰

According to the court, the District of Columbia mandated that all cases be brought before the CCRB prior to disciplining officers; thus, the CCRB's deficiencies assured officers went undisciplined for years.¹⁹¹ The District of Columbia responded to the backlog by increasing the budget of the CCRB (although not necessarily to the level requested), but the backlog proved intractable.¹⁹² To the municipality's credit, in 1991 CCRB requested permission to increase its capacity to hear complaints by establishing a panel system. In 1992 the District of Columbia Council finally adopted panels, mediators, and an "Early Warning Tracking System" to identify of-

188. See *Cox*, 821 F. Supp. at 3. The case procedure was unusual. Plaintiffs defaulted police officer defendants in 1991. The District of Columbia and Plaintiff agreed to submit the case without trial, filing a joint stipulation of facts, individual statements of evidence, individual proposed findings of fact and conclusions of law and briefs. See *id.*

189. See *id.* at 6.

190. See *id.* at 7 (footnotes omitted). Furthermore, the CCRB processed less than one-third of the complaints received. See *id.*

191. See *id.* at 6.

192. See *id.* at 7.

ficers involved in three or more citizen complaints within two years.¹⁹³

The *Cox* court noted that under *Canton*, “a city’s complete failure to maintain an adequate system of disciplining officers who act unconstitutionally might ‘fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury.’”¹⁹⁴ The court framed the issue:

Accordingly, the next step is to determine whether the consistent and chronic delays endemic to the District of Columbia’s civilian complaint review process constituted a policy or custom and whether maintenance of that policy or custom amounted to deliberate indifference by the District to its residents or to any other individuals who might come in contact with District police officers.¹⁹⁵

The court distinguished the quality of proof from an earlier case,¹⁹⁶ explaining that “[t]o establish a pattern, policy or custom, a plaintiff must present ‘concentrated, fully packed, precisely delineated scenarios’ of unconstitutional conduct.”¹⁹⁷ Acknowledging that this proof “is not easy to quantify,”¹⁹⁸ the court concluded that “Cox has firmly demonstrated a pattern on the part of the District of maintaining a complaint and disciplinary procedure so ineffective so as to virtually constitute a nullity, and, at the very least, deliberate indifference.”¹⁹⁹ Moreover, Cox demonstrated “that the District of Columbia did maintain, and indeed advance, a custom of egregiously delayed investigations.”²⁰⁰ The deleterious effects of the delays were compounded by the CCRB’s role as the “exclusive receptacle for citizen complaints.”²⁰¹ Worse, the delay resulted in failure to eliminate troublesome probationary officers, thus thwarting the purpose of the probationary period.²⁰² Finally, Cox presented a logical theory of statistical relevance: due to the egre-

193. *See id.* at 9.

194. *See id.* at 12. (quoting *Canton v. Harris*, 489 U.S. 378, 390 (1989)).

195. *Id.* at 12.

196. *See Carter v. District of Columbia*, 795 F.2d 116, 125 (D.C. Cir. 1986)).

197. *Id.* at 13 (quoting *Parker v. District of Columbia*, 850 F.2d 708, 712 (D.C. Cir. 1988)); *see also Beck v. City of Pittsburgh*, 89 F.3d 966, 975 (3d Cir. 1996) (explaining that statistical evidence coupled with actual written complaints is sufficient evidence from which to draw inference that procedures are inadequate).

198. *Cox*, 821 F. Supp. at 13.

199. *Id.* at 14.

200. *Id.*

201. *Id.*

202. *See id.* at 15. Moreover, the CCRB failed to comply with its own statutory deadlines (a thirty day requirement). *See id.*

gious delays (and static number of cases resolved) complaints against officers rose, presumably as a result of a failure to discipline and dismiss aberrant officers.²⁰³ Because of the lack of discipline (a consequence of delays), the court concluded that the District of Columbia's deliberate indifference to disciplining officers assured constitutional injuries would continue.²⁰⁴

Of some comfort to cash-strapped municipalities, the court noted that it was not implying that the District of Columbia should merely continue to throw increasing amounts of money at its flawed system (nor that merely increasing funding would be sufficient). Rather, the court suggested that "non-monetary alternatives" such as prioritization might suffice to remedy the failing system.²⁰⁵ *Cox* serves as a warning to large cities that while civilian review boards may serve important public interests, to the extent that their operation creates delays and inefficiencies in the overall disciplinary system, they must be redesigned or supplemented with simultaneous, parallel internal review and discipline. Arguably, the District of Columbia's primary problem arose because the civilian review board was the "sole receptacle for citizen complaints"²⁰⁶ and that discipline was delayed pending outcome of the board's review.²⁰⁷ As a result of the system's delays, the District of Columbia failed to take corrective action and officers gained permanent employment status in the department while awaiting hearings on alleged misconduct.²⁰⁸

In addition to liability based upon inefficiencies within the citizen board system, the manner in which the civilian review system is designed to investigate complaints may also expose municipalities to liability just as an internal system might. For example, in *Sango v. City of New York*,²⁰⁹ the plaintiffs successfully claimed that the abuses against them resulted from a faulty disciplinary system, marred by cursory investigations and inadequate cross-examina-

203. *See id.* at 16 nn.15, 17.

204. *See id.* at 16.

205. *Id.* at 17 n.19 (explaining that "the Court does not suggest that a particular sum of money should have been or should now be appropriated to address citizen complaints. . . other non-monetary alternatives could have been implemented").

206. *Id.* at 14.

207. *See id.* at 6.

208. Courts are particularly intolerant of municipalities that permit promotions and other personnel actions to go forward while complaints (especially multiple complaints) are pending. *See Vann v. City of New York*, 72 F.3d 1040, 1050 (2d Cir. 1995); *Cox*, 821 F. Supp. at 15.

209. No. 83 CV 5177, 1989 WL 86995 (E.D.N.Y. July 25, 1989).

tion of police witnesses.²¹⁰ A magistrate's report agreed with plaintiff's assessment that the investigations and the proceedings conducted by the review board were inadequate.²¹¹ Thus, like internal review, civilian review does not ensure thorough or rigorous investigations and may be similarly faulted for a lack of investigatory thoroughness. Worse, the civilian investigators may lack the competency of a police investigators.²¹²

210. *Id.* at *13. New York City's system ultimately subjects complaints to an eight member civilian panel. *Id.* at *4. Perez categorizes New York City's system as a hybrid system, with roles for both police and civilian monitors. PEREZ, *supra* note 15, at 166. New York is currently considering creating an Independent Police Investigation and Audit Board with authority to subpoena, investigate, audit and refer cases to the prosecutor. This independent board would compliment, not eliminate, the Civilian Complaint Review Board. See Dan Janison, *Cop Watchdog/New Panel is end-run on Rudy*, NEWSDAY, Oct. 1, 1997 at A28.

211. *Sango*, 1989 WL 86995, at *3. Despite a three level complaint review procedure, a Magistrate's Report found that the Civilian Complaint Review Board's investigation of complaints against the officer were "less than adequate." *Id.* The report criticized the investigations and hearings, noting "brief questioning" and lack of vigorous cross examination of the officer, failure to interview witnesses or in some cases, a failure to document how investigations were conducted. Without success, the City attempted to rebut the evidence with proof that the overall system was adequate, citing an overall 10% "substantiated" claims rate. The court rejected its argument stating, "it simply cannot be said that the percentage identified so conclusively demonstrates plaintiffs' inability to establish inadequate investigations amounting to deliberate indifference that summary judgment against plaintiffs is warranted." *Id.* at *12. See Dan Morrison, *Brutality Blind/Safir: Couldn't Predict Precinct Torture*, NEWSDAY, Sept. 12, 1997 at A8 (following incident of egregious brutality, Mayor plans to provide additional funds to hire more experienced investigators for the Civilian Complaint Review Board).

212. See PEREZ, *supra* note 15, at 143; Jones, *supra* note 39, at 517. *Beck v. City of Pittsburgh*, 89 F.3d 966 (3rd Cir. 1996), *cert. denied*, 117 S. Ct. . 1086 (1997), highlights the fact that civilian systems can experience the same deficiencies as internal systems. There, the Office of Professional Standards ("OPS") investigated complaints against police officers. *Id.* at 968. Perez identifies Pittsburgh as an example of a hybrid system, with roles for police and civilian investigators. See PEREZ, *supra* note 15, at 263. In reversing summary judgment in favor of Pittsburgh, the court faulted determinations made in a vacuum, lack of rigorous investigation, and lack of tracking officers.

The OPS itself was structured to curtail disciplinary action and stifle investigations into the credibility of the City's police officers. Even if complainant's witnesses were credible, their testimony became inert under OPS policy, while at the same time police officers' statements appeared to have been given special, favorable consideration.

....

Because there is no formalized tracking of complaints for individual officers, a jury could find that officers are guaranteed repeated impunity, so long as they do not put themselves in a position to be observed by someone other than another police officer.

Beck, 89 F.3d at 974.

Even if complaints are adequately and professionally investigated and resolved promptly, determinations under any system must result in discipline when appropriate.²¹³ Unlike internal or informal systems closely connected to the chief and the department, external, civilian systems must develop a method to communicate with the internal police departments. In order to impact personnel decisions, the actions of a civilian review board must interface with those charged with supervision and discipline of officers. In *Vann v. City of New York*,²¹⁴ the Second Circuit Court of Appeals reversed a decision granting summary judgment to New York based in part on a claim that an inadequate complaint review procedure demonstrated deliberate indifference regarding supervision of abusive police officers.²¹⁵ The court explained that deliberate indifference could be found "if the complaints are followed by no meaningful attempt on the part of the municipality to investigate or forestall further incidents."²¹⁶ In *Vann*, the plaintiff complained that various units of the police department failed to coordinate their independent knowledge of the police misconduct of officer Raul Morrison and this failure to communicate resulted in a failure to discipline the officer.²¹⁷ In this instance, the Department's Early Intervention Unit, which monitored problem police officers, knew about certain misconduct by Police Officer Morrison.²¹⁸ In addition, Morrison was referred to the Psychological Services Unit ("PSU") for perceived deficiencies. The Civilian Complaint Review Board received complaints about Morrison both before and after his probationary period.²¹⁹ Other departments working with problem officers, including the Department of Advocate's Office and the Central Personnel Index also knew of the officer's shortcomings.²²⁰ In reversing summary judgment in favor of New York the court noted that, "[n]one of these units,

213. Typically, decisions to discipline rest finally within the department and that fact alone should not be seen as a flaw unless recommendations are routinely ignored. In order to hold the chief accountable one must give the chief the responsibility. See Rudovsky, *supra* 26, at 497 (commenting that Civilian Review Board's recommendation of discipline should be given serious consideration); Jones, *supra* note 39, at 517; West, *supra* note 38, at 395; PEREZ, *supra* note 15, at 268 (stating that a discipline decision should reside with chief who must be held accountable).

214. 72 F.3d 1040 (2d Cir. 1995).

215. See *id.* at 1041.

216. *Id.* at 1049.

217. See *id.* at 1045.

218. See *id.* at 1042-43.

219. See *id.* at 1044.

220. See *id.*

except PSU, attached any significance to the filing of [civilian] complaints; and PSU did not advise those who know of the complaints to pass the information on to the supervisory units.”²²¹

These cases instruct municipalities that no matter which system is used to address citizen complaints, courts expect independent and thorough investigations within a system which functions efficiently and results in prompt corrective action. Personnel decisions such as promotion from probation and promotions to a higher rank must account for the existence and disposition of civilian complaints.²²² Finally, to cure pockets of abuse or system-wide abuse, departments must chart the location of trouble spots within their communities.²²³ As *Cox* demonstrates, courts are willing to infer that delayed discipline means the municipality is deliberately indifferent to the constitutional injuries of its citizens.

C. Negligently Administered Complaint Review Procedures

A negligently administered complaint system alone is insufficient to hold a municipality liable under § 1983. When a plaintiff does not allege that the system of citizen complaint review is systemically flawed or that the policymakers for the city deliberately ignore procedures, the claim will fail. If the municipality adopts an adequate system and policymakers demand its implementation, then mere mismanagement, even if it directly results in constitutional injury, will not suffice to impose municipal liability.

221. *Id.* at 1045. The court also noted that “commanding officers were not instructed to, and normally did not, report the filing of new civilian complaints. Nor did DAO seek or receive such information from CPI or CCRB. Foppiano testified that DAO was not concerned about the fact that a new civilian complaint had been filed against a DAO-monitored officer unless and until the officer was found guilty.” *Id.* at 1046.

222. In *Vann*, a police department psychologist explained the relevance of unsubstantiated complaints:

[T]he very fact that an unusual number of civilian complaints had been filed, without regard to how they were ultimately resolved, could create concern that the officer was experiencing psychological problems and was suffering from stress that caused him to escalate minor situations into major confrontations.

Vann, 72 F.3d at 1045.

223. See *Rudovsky*, *supra* note 26, at 497 (stating that civilian review boards should have the authority “to gather statistical data relevant to patterns of abuse”); Hecker, *supra* note 52, at 597-604 (recognizing that civilian review boards have the potential to cause institutional reforms); Petterson, *supra* note 38, at 273 (noting civilian review’s potential to make institutional changes); see also *Beck*, 89 F.3d at 974-75 (noting that police force does not make adequate use of the statistical evidence of problems it gathers).

*Wilson v. City of Chicago*²²⁴ exemplifies how *Canton* and *Brown* require more than mere negligence on the part of municipal policymakers. There, the plaintiff proved, at best, a negligently administered system of citizen complaint review. Plaintiff alleged his confession was coerced by torture and that Chicago policymakers tolerated such torture. Evidence revealed numerous complaints that police abused suspects accused of injuring or murdering police officers in a specific geographic area. The Court of Appeals for Seventh Circuit affirmed a grant of summary judgment in favor of Chicago despite strong evidence that widespread abuse took place against these suspects. Of the quality of anecdotal evidence, the court commented:

A rational jury could have inferred from the frequency of the abuse, the number of officers involved in the torture of Wilson, and the number of complaints from the black community, that [Superintendent of Police] Brzeczek knew that officers . . . were prone to beat up suspected cop killers. Even so, if he took steps to eliminate the practice, the fact that the steps were not effective would not establish that he had acquiesced in it and by doing so adopted it as a policy of the city.²²⁵

To compound the trouble in this Chicago neighborhood, the court concluded that, while the complaints against officers were properly referred for investigation, they apparently were not thoroughly investigated.²²⁶ The court concluded that a rational jury might have concluded that the policymaker knew of widespread torture by police in this particular neighborhood; however, the court explained that this was insufficient to establish liability.²²⁷ The court noted that Superintendent Brzeczek referred the complaints to an investigatory system that, if doing its job properly, should have ferreted out the abusers:

It was the plaintiff's responsibility to show that in doing this Brzeczek was not acting in good faith to extirpate the practice. That was not shown. At worst, the evidence suggests that Brzeczek did not respond quickly or effectively . . . that he was careless, maybe even grossly so given the volume of complaints. More was needed to show that he approved the practice. Failing to eliminate a practice cannot be equated to approving it. Otherwise, every inept police chief in the country would be

224. 6 F.3d 1233 (7th Cir. 1993).

225. *Id.* at 1240.

226. *See id.* ("the office had done nothing except lose a lot of complaints").

227. *See id.*

deemed to approve. . . the misconduct of the officers under his command.

Deliberate or reckless indifference to complaints must be proved in order to establish that an abusive practice has actually been condoned and therefore can be said to have been adopted by those responsible for making municipal policy.²²⁸

Unlike in *Hogan* and *Cox*, where plaintiff attacked a flawed system of complaint review, in *Wilson* the municipality had developed a procedure to hear and respond to citizen complaints.²²⁹ Plaintiff did not establish that the system, as designed, was inadequate to meet the public needs. Moreover, unlike the cases involving Chief Rotunda in Utica, Chief Bruce in North Little Rock, or Chief Stark in Rensselaer, plaintiff could not convince a court that Chicago policymakers permitted claims of misconduct to fall through the cracks with deliberate indifference to their merits. The failing, according to the court, was not a systemic deficiency but rather the negligent administration of the program.

Monell, *Canton*, and *Brown* make clear that mere negligence is not a basis of municipal civil rights liability. *Canton* specifically cautioned that no municipal liability would attach when "an otherwise sound program has occasionally been negligently administered."²³⁰ Municipal policymakers must ensure that an adequate system of civilian complaint is adopted and must deliver the message to subordinates that the system must be implemented. However, as *Wilson* demonstrates, negligent mismanagement in the follow-through is not alone sufficient to find municipal liability.

V. What Courts Expect From Municipalities

Municipal liability for civil rights violations based upon a faulty citizen complaint system will continue to be imposed even as more municipalities develop elaborate citizen complaint procedures. Lower court decisions reflect a judicial willingness to impose certain standards for reviewing citizen complaints against police. While this might be viewed as the judicial "second-guessing" *Canton* eschewed,²³¹ a community is nevertheless well-served by reas-

228. *Id.*

229. See *Sorlucco v. New York City Police Dep't*, 971 F.2d 864, 873 (2d Cir. 1992) (holding that expert testimony to establish pattern of failure to investigate complaints).

230. *Canton*, 489 U.S. at 390.

231. *Id.* at 392.

assessment of its complaint procedures in light of the increasing claims.

An examination of the judicial criticism of various civilian complaint models leads to the conclusion that to avoid liability for failure to respond effectively to citizen complaints a community should, at a minimum:

- 1) adopt a formal review system regardless of the size of the municipality;
- 2) provide an outside (nondepartmental) unit to receive complaints so that complainants can come forward without fear or intimidation;
- 3) accord investigators significant independence from the police chief;
- 4) ensure professionalism in the conduct of investigations and hearings whether conducted by police or civilians;
- 5) provide an opportunity for witnesses, officers, and complainants each to be heard;
- 6) set and enforce time requirements to ensure that the review system results in speedy resolution and discipline when appropriate;
- 7) prioritize cases by the nature of the complaints so that those suggesting public danger are addressed first;
- 8) index pending, sustained and unsustained complaints by individual officer to ensure early identification of problem officers;²³² and
- 9) take action based upon the identification of problems and communicate the outcome of citizen complaint review to departmental agencies taking other personnel action.²³³

232. Even if discipline cannot be meted out for unsustained complaints, judicial opinions suggest that many complaints in an officer's personnel file may suggest nascent problems deserving evaluation and prophylactic intervention short of discipline. In addition, multiple pending complaints may reveal a need for swift intervention. See *Beck*, 89 F.3d at 974 ("[B]ecause there is no formalized tracking of complaints for individual officers, a jury could find that officers are guaranteed repeated impunity"); *Vann*, 72 F.3d at 1050; *Cox*, 821 F. Supp. at 13-15. Placing unsustained complaints in personnel files may conflict with collective bargaining agreements.

233. My recommendations are a result of reviewing litigation trends. However, they are not inconsistent with the recommendations of law enforcement evaluators. For example, the Police Executive Research Forum (PERF) model policy statement, "[w]ith regard to the complaints system itself, . . . stresses that it must be accessible to all persons who wish to file a complaint, must function consistently, and must collect and analyze misconduct complaints on a monthly basis. Additionally, it argues for a 120-day limit on the disposition of all complaints." West, *supra* note 38, at 398 (citing PERF, *Police Agency Handling of Citizen Complaints: A Model Policy Statement* (Washington, D.C. 1983)); Livingston, *supra* note 26, at 664 (recommending broader civilian role in providing information about police performance); *Hecker*, *supra* note

While these suggestions seem to come as much from common sense as from judicial wisdom, surprisingly, the cases suggest that municipalities have had difficulty implementing these standards. So long as the federal courts are engaged in the evaluation of municipal programs, it behooves municipalities to take note of judicial decisions and adapt their citizen complaint procedures accordingly.

VI. Conclusion

While the Supreme Court has expressed a desire to spare federal courts from "the endless exercise of second-guessing" which would "implicate serious questions of federalism,"²³⁴ judicial scrutiny of the adequacy of civilian complaint procedures employed by municipalities is increasing. Police departments of all sizes may be held liable for poorly designed or implemented civilian complaint procedures. When these procedures fail to detect and discipline officers engaging in misconduct, the fault rests with policymakers who act with deliberate indifference. Both internal and external models of complaint review pose problems for police forces. Recent cases instruct municipalities to formally and promptly address citizen complaints. The litigation experience of some municipalities suggests that, to avoid municipal liability, municipalities might consider adopting a system utilizing both internal and external review²³⁵ of police misconduct. At the outset, the municipality is better served by a citizen complaint system which provides multiple units to receive complaints. During the investigatory stage, independence and competence are essential to creating a sense of integrity and legitimacy in the eventual outcome. At the resolution stage, the decision must be rendered promptly and appropriate discipline delivered. Municipalities must also engage in regular evaluation of their complaint procedures, or else mere supervisory negligence will rise to deliberate indifference. Finally, municipalities must systematically track complaints by officer and geographic area, looking for patterns and pockets of misconduct within its

52, at 602 (recommending monitoring through data collection); Jones, *supra* note 39, at 517 (recommending that civilian boards be empowered to make policy changes).

234. *Canton*, 489 U.S. at 392; see also *Rizzo v. Goode*, 423 U.S. 362, 375-76 (1976) (denying injunctive relief for alleged widespread police abuses in Philadelphia and indicating that delicate issues of federal-state relationships would be implicated if such relief were granted).

235. See William C. Smith & Geoffrey P. Alpert, *Law Enforcement: Policing the Defective Centurion—Decertification and Beyond*, 29 CRIM. L. BULL. 147, 155-58 (1993) (advancing a decertification model for certain misconduct which should actively solicit citizen complaints as well as those internally generated).

force. Without indexing and tracking complaints, the municipality may be viewed as ignoring its institutional problems. Despite the municipality's freedom from respondeat superior liability for civil rights violations, if a municipality does not take the complaint review process seriously, municipalities will be exposed to civil rights liability for even a few bad apples.

CONSTITUTIONAL CHALLENGES TO NEW YORK STATE'S DEATH PENALTY STATUTE

*John M. Shields**

I. Introduction

New York State's death penalty statute is constitutionally flawed in many respects. It violates the state and federal prohibition against cruel and unusual punishment and provides unrestricted prosecutorial discretion to pursue the death penalty. This standardless and unfettered discretion creates the risk of arbitrary or discriminatory application of capital punishment.

The statute is unconstitutionally vague in many ways. For example, the statute fails to provide an adequate definition of "serial murder" under New York Penal Law section 125.27 (1)(a)(xi). There is also no description or definition of "similar fashion" or "common scheme or plan" to adequately guide the various prosecutors in this most final of decisions. The existing statute must fail as a result of this unconstitutional vagueness, particularly in light of the stakes confronting the accused.

Should the statute, as it exists today, be held constitutional, capital defendants must be provided with a preliminary hearing to determine the specific procedures and standards employed by the District Attorney in deciding to pursue the death penalty in each specific case. Such a preliminary hearing would be necessary to ascertain whether the decision in each case adheres to these standards, assuming any standards exist. Such a hearing is imperative to determine whether, in a particular case, the prosecutor arbitrarily has pursued the death penalty.

A defendant, once indicted on first-degree murder charges, faces a potential death sentence. To date, the various District Attorneys' decisions to pursue the death penalty in New York have been entirely internal. Neither defense counsel nor any other external party has become privy to any existing death penalty determination procedures.

The New York death penalty statute itself does not establish or provide any procedure or standard to guide the various District Attorneys in the process of deciding whether to pursue capital punishment. Unlike at the federal level, where internal sentencing

* (INSERT BIOGRAPHICAL INFORMATION)

guidelines supplement the federal statute, New York prosecutors have not formalized or memorialized any policy or procedure which must be followed prior to seeking the death penalty. As a result, prosecutors' offices are insulated from any review or scrutiny of the decision to pursue the death penalty in a particular case.

New York Courts are now facing the first death penalty cases in fifteen years.¹ This Article uncovers the numerous constitutional infirmities of the New York death penalty statute. Part II discusses the recent New York case which held the existing death penalty plea provisions unconstitutional. Part III explains the heightened scrutiny required in capital cases, focusing primarily on the necessity of preventing arbitrary application of the death penalty. Part IV reveals the unfettered discretion with which the various District Attorneys are provided under the current statute, which creates the risk of unconstitutionally arbitrary application. Part V analyzes the existing vagueness in the current statute.

Consequently, Part VI recommends clear statewide guidelines to assist in the capital selection process. Finally, Part VII discusses the necessity of a preliminary hearing in each case to determine whether the death penalty has been pursued in an arbitrary fashion.

II. The New York Provisions Regulating Guilty Pleas in Capital Cases Are Unconstitutional

The relevant sections of the New York death penalty statute permit a capital defendant to plead guilty only with consent from the prosecution and the court and where the agreed upon sentence is other than death.² In *People v. Hale*,³ the court held that these provisions violate the New York and Federal Constitutions.⁴

The *Hale* court rejected the argument that, since the defendant did not offer to plead guilty, he did not suffer an actual injury, and therefore lacked the proper standing to challenge the statute.⁵ The court held that the plea provisions not only denied a defendant's privilege against self-incrimination, they also penalized his right to a jury trial.⁶ Therefore, even if the defendant were to persist in

1. See Daniel Wise, *Brooklyn, Dutchess Courts Prepare for Capital Trials*, N.Y. L.J., March 5, 1998, at 1.

2. See N.Y. CRIM. PROC. LAW §§ 220.10(5)(e), 220.30(3)(b)(vii), 220.60(2)(a) (McKinney Supp. 1998).

3. 173 Misc.2d 140, 661 N.Y.S.2d 457 (1997).

4. See *id.* at 185, 661 N.Y.S.2d at 483.

5. See *id.* at 177, 661 N.Y.S.2d at 478.

6. See *id.* at 177-78, 185, 661 N.Y.S.2d at 478, 483.

pleading "not guilty" and "exercise his right to a jury trial, he would still have standing to raise this claim."⁷ The court followed the decision of the United States Supreme Court in *United States v. Jackson*,⁸ in which the Court held that a similar provision of the Federal Kidnaping Act unconstitutionally infringed upon the right to a jury trial by exposing the defendant to the risk of death only when he pleaded not guilty and demanded a jury trial, and thus, needlessly encouraged guilty pleas.⁹

Similarly, New York's current death penalty statute provides for imposition of the death penalty only pursuant to the recommendation of the jury.¹⁰ Moreover, the statute prohibits imposing a death sentence when a defendant enters a guilty plea or waives a jury trial.¹¹ Therefore, only if a defendant waives his or her Sixth Amendment right to a jury trial and Fifth Amendment privilege against self-incrimination can he or she avoid death.¹² Accordingly, the *Hale* court held the pertinent plea provisions unconstitutional.¹³

Judicial scrutiny and consent of the prosecutor (the defendant's primary adversary) do not remedy the constitutional infirmity of the existing provision.¹⁴ In fact, the current plea provisions encourage prosecutors to use the threat of death to induce guilty pleas.¹⁵ Arguably, a prosecutor is more likely to consent to guilty pleas in cases where evidence is lacking and conviction is uncertain.¹⁶ Such a scheme discourages a defendant from exercising his or her constitutional rights for fear of a death sentence.¹⁷

Prior to *Hale*, New York courts did not have an opportunity to apply the *Jackson* holding to a death penalty statute. However, only two years after the *Jackson* decision, the Court of Appeals relied on *Jackson* and struck down a similar provision.¹⁸ In *Michael A.C.*, the court struck down a provision which allowed for

7. *Id.* at 178, 661 N.Y.S.2d at 478 (citing *Robtoy v. Kincheloe*, 871 F.2d 1478, 1480 (9th Cir. 1989)).

8. 390 U.S. 570 (1968).

9. *See id.* at 583.

10. *See Hale*, 173 Misc.2d at 179, 661 N.Y.S.2d at 479.

11. *See id.*

12. *See id.* at 179-80, 661 N.Y.S.2d at 479-80.

13. *See id.* at 180, 661 N.Y.S.2d at 480 (citing *People v. Black*, 312 N.Y.S.2d 658 (1970), *aff'd*, 281 N.E.2d 849 (1972)).

14. *See id.* at 181-82, 661 N.Y.S.2d at 481.

15. *See id.* at 182, 661 N.Y.S.2d at 481.

16. *See id.*

17. *See id.*

18. *See id.* at 183, 661 N.Y.S.2d at 482 (citing *People v. Michael A.C.*, 27 N.Y.2d 79, 86, 261 N.E.2d 620, 624, 313 N.Y.S.2d 695, 700 (1970)).

"youthful offender" treatment for certain defendants only if they waived their right to a jury trial.¹⁹ A procedure that offers preferential treatment contingent upon the waiver of a fundamental constitutional right, or imposes a harsher penalty for asserting it, is unconstitutional.²⁰ If such a provision is constitutionally impermissible in a non-capital case, it is clearly more repugnant in a death penalty situation, which is greater in severity and finality.²¹

The *Hale* court advised that courts of first instance should not declare legislative acts unconstitutional unless they are invalid on their face and involve life and liberty.²² Clearly, life and liberty are at stake in any capital case. Therefore, it would be illogical to allow cases to proceed under suspect provisions only to have them later reversed.²³ In the face of overwhelming evidence, the *Hale* court held that the New York death penalty provisions violated the Fifth and Sixth Amendments to the United States Constitution and its corresponding provisions in the New York State Constitution.²⁴ New York courts should follow these recommendations and closely examine the remaining portions of the statute for constitutional infirmity.

III. The Heightened Scrutiny in Capital Cases Cannot Tolerate the Potential for Arbitrariness

The pending capital cases in New York are the earliest applications of a new statute exposing a defendant to the most severe penalty tolerated by law. The death penalty, the taking of human life, is an irrevocable and supreme punishment which violates the most basic human rights guaranteed by the United States Constitution and further protected by the New York State Constitution. The Supreme Court consistently has referred to the unique finality and severity of the death penalty, stating that capital sentencing must be subject to special scrutiny to avoid unfair or arbitrary application. The awesome governmental power to extinguish human life requires the most heightened scrutiny.²⁵ The substantive and pro-

19. *Michael A.C.*, 27 N.Y.2d at 86, 261 N.E.2d at 624, 313 N.Y.S.2d at 700.

20. *See Hale*, 173 Misc.2d at 183-84, 661 N.Y.S.2d at 482 (quoting *Michael A.C.*, 27 N.Y.2d at 86, 261 N.E.2d at 624, 313 N.Y.S.2d at 700).

21. *See id.* at 184, 661 N.Y.S.2d at 482 (citing *Gregg v. Georgia*, 428 U.S. 153 (1976)).

22. *See id.* at 185, 661 N.Y.S.2d at 483 (quoting *McKinney's Statutes*, ch. 6, § 150 at 312 (McKinney 1971)).

23. *See id.* at 185-86, 661 N.Y.S.2d at 483.

24. *See id.* at 185, 661 N.Y.S.2d at 483.

25. *See McCleskey v. Kemp*, 481 U.S. 279, 340-42 (1987) (Brennan, J., dissenting).

cedural provisions unique to capital cases evidence the necessity for heightened reliability. The lack of existing guidelines fails to fulfill these strict requirements.

To be considered constitutional, a death penalty statute must, among other things, genuinely narrow the class of persons eligible for the death sentence and reasonably justify this most final sentence on the defendant as compared to others found guilty of murder.²⁶ The Supreme Court's Eighth Amendment analysis of capital sentencing has proceeded from the premise that the imposition of death is a punishment so profoundly different from all other sanctions that it requires a heightened degree of reliability.²⁷ Procedures that may be completely acceptable in ordinary cases may be condemned in capital cases.²⁸

No punishment implicates equality and fairness more than the death penalty, clearly the ultimate exercise of governmental power concerning individual rights.²⁹ The New York statute does not pass muster under this federal test, as no such special scrutiny exists in the statute. In the pending capital cases, the District Attorneys in New York's various counties have not employed any such heightened scrutiny in deciding to pursue the death penalty.

26. See *U.S. v. Chandler*, 996 F.2d 1073, 1092 (11th Cir. 1993) (citing *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988)); *U.S. v. Pitera*, 795 F. Supp. 546, 553 (E.D.N.Y. 1992) (citing *Zant v. Stephens*, 462 U.S. 862, 877 (1983)).

27. See, e.g., *Parker v. Dugger*, 498 U.S. 308 (1991) (reversing death sentence as arbitrary and capricious); *Sawyer v. Smith*, 497 U.S. 227 (1990); *Thompson v. Oklahoma*, 487 U.S. 815, 856 (1988) (O'Connor, J., concurring) (observing that death penalty has been treated differently from all other punishments); *Mills v. Maryland*, 486 U.S. 367, 383-84 (1988) (observing that decision to execute a defendant is unlike any other decision); *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (holding that execution is the most irremediable and unfathomable of penalties; death is different) (citing *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)); *Turner v. Murray*, 476 U.S. 28, 35 (1986) (holding that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination) (citing *California v. Ramos*, 463 U.S. 992, 998-99 (1983)); *Ake v. Oklahoma*, 470 U.S. 68 (1985); *Spaziano v. Florida*, 468 U.S. 447 (1984); *Godfrey v. Georgia*, 446 U.S. 420, 437 (1980) (Marshall, J., concurring) (observing that the uniqueness of the death penalty requires that the sentencer's discretion be channeled and guided by clear, objective, and specific standards); *Lockett v. Ohio*, 438 U.S. 586 (1978); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *U.S. v. Davis*, 912 F. Supp. 938 (E.D. La. 1996); *United States v. Pitera*, 795 F. Supp. 546, 553 (E.D.N.Y. 1992).

28. See *Caspari v. Bohlen*, 510 U.S. 383, 392 (1994) (citing *Strickland v. Washington*, 466 U.S. 668, 704-5 (1984)).

29. See Stewart F. Hancock, Jr., et al., *Race, Unbridled Discretion, and the State Constitutional Validity of New York's Death Penalty Statute—Two Questions*, 59 ALB. L. REV. 1545, 1546 (1996).

Any marginal benefit to the state from a death sentence, as opposed to life imprisonment, is "considerably less than the marginal difference to the defendant between death and life in prison."³⁰ Such disparity confirms that the potential for arbitrariness cannot be tolerated in capital punishment.³¹ Consequently, the degree of arbitrariness that would invalidate a death penalty as "cruel and unusual" would not serve to invalidate lesser penalties, as death penalty supporters contend.³²

McCleskey demonstrated that the prosecutorial decision-making process necessary to determine whether to pursue the death penalty was susceptible to arbitrariness and discriminatory application.³³ In fact, the District Attorney confirmed the broad and unguided discretion that the prosecutor's office consistently employed.³⁴ Given the qualitative difference between death and any other penalty, as well as the correlating necessity for confirming the reliability of such a final punishment, the risk of arbitrary application is unacceptable.³⁵ Any possible risk that the death penalty will be imposed arbitrarily is unconstitutional.³⁶

In *McCullah*, the Court held that the existing statute tended to skew the process, creating the risk that the death penalty will be imposed arbitrarily, and thus unconstitutionally.³⁷ Again, the New York capital scheme does not have the requisite standards to prevent arbitrary application. In fact, no standards exist.

Even assuming that the New York death penalty statute can survive a federal constitutional challenge, it does not satisfy the heightened scrutiny and increased individual protections afforded by the New York Constitution. New York State traditionally affords greater constitutional protection for individual rights than the federal Constitution, particularly in the criminal arena, and places a "particular emphasis on principles of fairness and equality."³⁸ In-

30. *McCleskey*, 481 U.S. at 340 (Brennan, J., dissenting).

31. *See Id.*

32. *Id.*

33. *See id.* at 357.

34. *See id.*

35. *See id.* at 366 (Stevens, J., dissenting).

36. *See United States v. McCullah*, 76 F.3d 1087, 1111 (10th Cir. 1996) (citing *Stringer v. Black*, 503 U.S. 222, 230-32 (1992)).

37. *See id.*

38. *See Hancock, supra* note 29 at 1546; *see e.g., People v. Scott*, 79 N.Y.2d 474, 593 N.E.2d 1328, 583 N.Y.S.2d 920 (1992) (discussing searches of private land); *People v. Dunn*, 77 N.Y.2d 19, 564 N.E.2d 1054, 563 N.Y.S.2d 388 (1990) (discussing search and seizure); *People v. Van Pelt*, 76 N.Y.2d 156, 556 N.E.2d 423, 556 N.Y.S.2d 984 (1990) (discussing state due process protection); *People v. Vilardi*, 76 N.Y.2d 67, 555 N.E.2d 915, 556 N.Y.S.2d 518 (1990) (regarding disclosure of exculpatory evi-

deed, New York has traditionally been a leader, and the New York Court of Appeals has consistently interpreted the New York State Constitution to extend and increase protection of individual rights and liberties beyond the federal Constitution as construed by the Supreme Court.³⁹

Surely individual states, and specifically New York, may construe their own constitutions to more stringently constrain police or state conduct than the federal Constitution.⁴⁰ Similarly, other states have also recognized that state constitutional protection should extend past that of its federal companion, especially in the area of capital punishment.⁴¹ Due to the magnitude of the decision to take a human life and the accompanying unacceptable risk of error, the Massachusetts Supreme Court struck down that state's death penalty statute as unconstitutional.⁴² In *Watson*, the Court held that the prosecutor's unlimited charging discretion created an impermissible risk of arbitrary imposition of the death penalty.⁴³ In *Tichnell v. State*,⁴⁴ the Maryland Court of Appeals held that unfettered prosecutorial discretion resulted in arbitrary death penalty sentencing.

The prevailing inconsistency and uncertainty in the manner in which the decision to pursue the death penalty is made, coupled with New York's traditional heightened protection of individual rights, forces the conclusion that New York's recently enacted

dence); *People v. Davis*, 75 N.Y.2d 517, 553 N.E.2d 1008, 554 N.Y.S.2d 460 (1990) (regarding right to counsel); *People v. Kern*, 75 N.Y.2d 638, 554 N.E.2d 1235, 555 N.Y.S.2d 647 (1990) (holding that state's equal protection clause extends beyond federal); *People v. Torres*, 74 N.Y.2d 224, 543 N.E.2d 61, 544 N.Y.S.2d 796 (1989) (discussing automobile searches); *Patchogue-Medford Congress of Teachers v. Board of Educ.*, 70 N.Y.2d 57, 510 N.E.2d 325, 517 N.Y.S.2d 456 (1987) (regarding mandatory urine tests); *People v. P.J. Video, Inc.*, 68 N.Y.2d 296, 501 N.E.2d 556, 508 N.Y.S.2d 907 (1986) (discussing search warrants); *People v. Class*, 67 N.Y.2d 431, 494 N.E.2d 444, 503 N.Y.S.2d 313 (1986) (discussing automobile searches); *People v. Bigelow*, 66 N.Y.2d 417, 488 N.E.2d 451, 497 N.Y.S.2d 630 (1985) (discussing probable cause); *People v. Belton*, 55 N.Y.2d 49, 432 N.E.2d 745, 447 N.Y.S.2d 873 (1982) (discussing search of car incident to arrest); *People v. Cunningham*, 49 N.Y.2d 203, 400 N.E.2d 360, 424 N.Y.S.2d 421 (1980) (discussing waiver of right to counsel).

39. See *Hancock*, *supra* note 29, at 1549-51 (discussing thoroughly recent cases and relevant scholarly articles).

40. See *Scott*, 79 N.Y.2d at 504-05 (Kaye, C.J., concurring).

41. See, e.g., *State v. Marshall*, 613 A.2d 1059 (N.J. 1992); *State v. Gerald*, 549 A.2d 792 (N.J. 1988); *State v. Koedatich*, 548 A.2d 939 (N.J. 1987); *State v. Ramser*, 524 A.2d 188 (N.J. 1987).

42. See *District Attorney for Suffolk Dist. v. Watson*, 411 N.E.2d 1274, 1286 (Mass. 1980).

43. *Id.*

44. 468 A.2d 1, 24 (Md. 1983).

death penalty statute is unconstitutional. Further, no realistic proportionality review exists for those individuals sentenced in New York prior to the collection of relevant statistical data. The review of an isolated sentence is useless if the underlying statutory framework is inherently arbitrary, and thus unconstitutional.

IV. New York's Death Penalty Statute Provides a District Attorney with Unfettered Discretion to Pursue the Death Penalty, Thereby Creating the Risk of Unconstitutionally Arbitrary Application

Under the present statutory scheme in New York State, the District Attorney in each county has absolute discretion in determining whether to seek the death penalty. The State provides inadequate, if any, guidance or standards to assist or govern the prosecutor's decision to charge first or second degree murder, the former carrying the possible death sentence.

The lack of guidance or standards within the New York statute allows for wide variations in the imposition of the death penalty from county to county depending on the individual views of the local prosecutor. This unbridled, state-sanctioned discretion presents the potential for arbitrary administration in violation of both the state and federal constitutions.

The New York statute, Penal Law § 125.27, defines first-degree murder as the intentional killing of another person accompanied by one of a number of enumerated aggravating factors. At Penal Law § 60.60, the statute provides three possible sentences for those found guilty of violating the statute, including death. The aggravating factors themselves are vague and troublesome, as the statutory definitions vest prosecutors with wide discretion. Prosecutors also have wide discretion with regard to the type of murders that can be charged as capital. Once a case is "death eligible" no further guidelines exist either in the statute itself or in other policies or sentencing guidelines to determine when the District Attorney should pursue capital punishment.

Once an individual is indicted for first-degree murder, the prosecutor has one hundred and twenty days to file a notice of intent to seek the death penalty. The governing statute fails to provide any further prosecutorial guidelines or procedures for prosecutors to follow in determining when to pursue the death penalty and how

such a decision should be made.⁴⁵ Therefore, the ultimate life or death decision is entirely subject to the unguided whim of the prosecutor in clear violation of both the federal and state constitutions.

Further, unique to all other defendants, a capital defendant may not enter a guilty plea without the consent of the court and the prosecutor, providing the District Attorney with veto power in capital cases.⁴⁶ Consequently, the District Attorney may reject a guilty plea, which is otherwise acceptable to the court, in order to pursue the death penalty.

Ultimately, unfettered prosecutorial discretion in this most critical decision allows the individual prosecutor's personal, ethical, moral, philosophical, and religious beliefs to influence or even dictate his or her decision to pursue the death penalty. Based on such beliefs, the District Attorney may even force a defendant to go to trial and receive the death penalty, rather than enter a guilty plea prior to trial. Without clearly articulated procedures, this tremendous decision is further influenced by other tangible and intangible outside pressures, including economic and political variables.⁴⁷ Indeed, there already exists a clear disparity among the current District Attorneys in the different counties, creating a significant degree of variation in who receives the death penalty.⁴⁸ The recent

45. See N.Y. CRIM. PROC. LAW § 250.40 (McKinney Supp. 1996).

46. See *Hale*, 661 N.Y.S.2d at 478, 173 Misc. 2d at 178.

47. See, e.g., *Marshall*, 613 A.2d at 1144-49 (N.J. 1992) (Handler, J., dissenting) (discussing exorbitant costs in capital cases, including statistics and figures); *Koedatich*, 548 A.2d at 1018 (N.J. 1988) (Handler, J., dissenting) (indicating that political pressures which influence prosecutorial discretion may lead to arbitrary results); see also Steven H. Jupiter, *Constitution Notwithstanding: The Political Illegitimacy of the Death Penalty in American Democracy*, 23 FORDHAM URB. L.J. 437, 438-9 (1996); Daniel Wise, *Doubts Emerge Over Death Penalty Costs: Defenders, Prosecutors Apprehensive About Adequacy of State Appropriations*, N.Y.L.J., Mar. 17, 1995, at 1 (describing the overwhelming cost of a capital trial); Daniel Wise, *Prosecutors Want Death Penalty; Qualms Voiced About Costs, Time, Training of Lawyers*, N.Y.L.J., Mar. 3, 1995, at 1. (reporting that Manhattan District Attorney stated that the death penalty will be a major impediment to law enforcement because of wasted money, resources and time. Similarly, Monroe and Tioga County District Attorneys voiced disapproval of capital trials for economic reasons).

48. See, e.g., Dean Chang, *Death Penalty Still in Wings*, DAILY NEWS, Sept. 1, 1996, at 18; Daniel Jeffreys, *New York Invites its Murders to Take a Seat*, THE INDEPENDENT, Aug. 31, 1995, at 4-5; Molly McCarthy, *DA to Seek Serial Suspect's Execution if Jury Convicts*, NEWSDAY, Aug. 13, 1996, at A3, A18 (reporting Suffolk County District Attorney James Catterson's announcement that he had "no realistic choice" but to seek the death penalty); see Gloria Wright, *Onondaga D.A. Will Seek Death Penalty*, POST-STANDARD, Jan. 1, 1996, at A1 (reporting that Onondaga County District Attorney has announced his intention to seek the death penalty). Similarly, Ulster County's District Attorney publicly stated intention to seek the death penalty. See David E. Rovella, *Fake Plea Bargain in Death Case Raises Concerns*, NAT'L L.J.,

circumstances in *Johnson v. Pataki*,⁴⁹ where the District Attorney decided not to pursue the death penalty in a death eligible case, revealed the inherent arbitrariness of unguided discretion in the individual decision making process. That the Attorney General eventually usurped the District Attorney's authority in *Johnson* only confirms that the personal opinions of one human being are dictating the life or death determination.

Indeed, the recent New York death penalty statute is inconsistent with New York's traditional role as a leader in providing heightened protection for individual liberties and expanding the protections afforded by the Federal Constitutional and courts. Unfortunately, in some of the recent federal cases involving Eighth Amendment challenges to the arbitrary discretion of the prosecution, the courts have not articulated any clear answers.⁵⁰

In *Furman v. Georgia*,⁵¹ the United States Supreme Court struck down Georgia's death penalty statute as unconstitutional.⁵² In its decision, the Court determined that the Georgia statute was tantamount to cruel and unusual punishment.⁵³ The central and constant theme throughout *Furman* was that the statute lacked sufficient safeguards to prevent arbitrary, inconsistent, and discriminatory imposition of the death penalty.⁵⁴ Since *Furman*, the touchstone in evaluating a particular sentencing decision is the *mere risk* of an arbitrary application of this severe and final imposition of capital punishment.⁵⁵

An arbitrary capital scheme results from a lack of guidance in any phase of the process. The lack of adequate prosecutorial guidance in the decision to pursue capital punishment is analogous to

Oct. 9, 1995, at A13. Conversely, the Bronx County Chief Prosecutor has stated that he has no intention of ever seeking the death penalty. See Joseph Dolman, *The Bronx D.A. Who Says No Way*, NEWSDAY, Mar. 16, 1995, at A33; *Excerpt from Messages by Governor George E. Pataki and Robert T. Johnson*, N.Y. TIMES, Mar. 22, 1996, at B2; Jan Hoffman, *News Analysis: Death Penalty Test*, N.Y. TIMES, Mar. 24, 1996 at 43; Rachel L. Swarns, *Governor Removes Bronx Prosecutor from Murder Case*, N.Y. TIMES, Mar. 22, 1996, at A1.

49. 229 A.D.2d 242, 655 N.Y.S.2d 463 (1st Dep't 1997).

50. See, e.g., *U.S. v. Chanthadara*, 928 F. Supp. 1055, 1057 (D. Kan. 1996) (dismissing an Eighth Amendment challenge that the federal death penalty statute creates a risk of arbitrary death sentence); *U.S. v. Walker*, 910 F. Supp. 837, 857-8 (N.D.N.Y. 1995) (dismissing defendant's challenge that they had been arbitrarily selected for punishment).

51. 408 U.S. 238 (1972).

52. See *Furman*, 408 U.S. at 239-40.

53. See, *id.*

54. See *id.* at 244-45 (Douglas, J. Concurring with *per curiam* decision).

55. See *McCleskey*, 481 U.S. at 322-23, citing *Godfrey*, 446 U.S. at 427.

a lack of appropriate limitations on sentencing discretion. The Supreme Court, in *McCleskey v. Kemp*,⁵⁶ articulated critical concerns about the arbitrary nature of a capital sentencing scheme. Although the *McCleskey* decision upheld the Georgia death penalty statute, it was a vigorously contested five to four decision. In fact, Justice Powell, author of the majority opinion in *McCleskey*, has since publicly indicated that he would now join the dissent.⁵⁷

Justice Brennan, in his dissent in *McCleskey*, stated that although a state may attempt to provide prosecutorial guidance in capital sentencing, the discretion afforded prosecutors and jurors creates the potential for arbitrary or discriminatory applications:⁵⁸ “[n]o guidelines govern prosecutorial decisions to seek the death penalty.”⁵⁹

In *United States v. Pitera*, the court dismissed the defendant’s claim of arbitrary prosecution as being without merit.⁶⁰ The *Pitera* case involved a federal statute making it a capital offense to commit intentional murder in connection with the commission of serious drug crimes.⁶¹ The statute contained an arguably clearer definition of “common scheme” than the New York statute and reflected obvious public policy considerations with relation to large-scale drug trafficking. Further, the federal system has clearly articulated rigid and thorough internal prosecutorial guidance and standards.⁶² Ironically, the court’s discussion of the facts in *Pitera* reveals precisely the exact potential *risk* of arbitrary application the federal standard prohibits.⁶³ The court in *Pitera* stated that due process would not tolerate arbitrary and discriminatory prosecution. Conversely, the court also held that any undue inquiry into prosecutorial decisions might “chill” law enforcement efforts and

56. 481 U.S. 279 (1987).

57. See Stewart F. Hancock Jr. et al., *Race, Unbridled Discretion, and the State Constitutional Validity on New York’s Death Penalty Statute*, 59 ALB. L. REV. 1545, 1558 (citing Mark A. Graber, *Judicial Recantation*, 45 SYR. L. REV. 807 (1994)); Norman Redlich *Politics and the Death Penalty: Can Rational Discourse and Due Process Survive the Perceived Political Pressure?* 21 FORD. URB. L.J. 239, 294 (1994); Marcia Coyle, *Powell Recants Death Penalty View*, NAT’L L.J., June 13, 1994, at A12; John C. Jeffries, Jr., *A Change of Mind That Came Too Late*, N.Y. TIMES, June 23, 1994 at A23.

58. See *McCleskey*, 481 U.S. at 333.

59. *Id.*

60. *United States v. Pitera*, 795 F. Supp 546, 567 (E.D.N.Y. 1992).

61. See *id.* at 550.

62. See *id.*; see also *infra* Part VI.

63. *Pitera*, 795 F. Supp. at 551.

undermine prosecutorial effectiveness by revealing government enforcement policies.⁶⁴

New York, like other states, recognizes the individual state's interest in extending the rights and protections guaranteed by the federal Constitution. Capital punishment is a matter of particular state interest and does not require a uniform national policy.⁶⁵ It is imperative that the states invalidate sentencing schemes that may result in unequal sentencing.⁶⁶

In *District Attorney for Suffolk Dist. v. Watson*,⁶⁷ the Massachusetts Supreme Court held that unfettered prosecutorial discretion created an unconstitutional risk of arbitrary imposition of the death penalty. In *Tichnell v. State*,⁶⁸ the Maryland Court of Appeals found untrammelled prosecutorial discretion resulted in arbitrary death penalty sentencing. Similarly, New York prosecutors do not have any standards to follow in this grave decision process.

New York cannot tolerate arbitrary imposition of the death penalty. Given the existing uncertainty, coupled with New York's tradition of enhancing federal protections against cruel and unusual punishment, New York's death penalty scheme is inherently discriminatory, posing a clear and unacceptable risk of being meted out arbitrarily.⁶⁹ Further, the New York Court of Appeals has not addressed the constitutionality of a capital punishment statute since striking down the previous death penalty statute over ten years ago on similar grounds.⁷⁰

In *People v. Smith*, the New York Court of Appeals struck down the then existing death penalty statute. The Court in *Smith* discussed the prohibition against arbitrary and capricious imposition of the death penalty and rejected the people's argument that the capital statute was narrowly drawn.⁷¹ The recently enacted death penalty statute similarly fails adequately to guide the prosecutor's discretion and further fails entirely to define the requisite aggravating factors to be considered in seeking death.

64. *Id.* at 568.

65. See *State v. Marshall*, 613 A.2d 1059, 1123 (N.J. 1992) (Handler, J., dissenting opinion); *State v. Koedatich*, 548 A.2d 939, 951 (N.J. 1988) (citing *State v. Ramseur*, 524 A.2d 188 (N.J. 1987)).

66. See *Marshall*, 613 A.2d at 1123.

67. 411 N.E.2d 1274, 1284-85 (1980).

68. 468 A.2d 1, 19 (1983).

69. See *McCleskey v. Kemp*, 481 U.S. 279, 320 (Brennan, J., dissenting opinion).

70. See *People v. Smith*, 468 N.E.2d 879 (1984), 63 N.Y.2d 41, 279 N.Y.S.2d 706; see also *People v. Davis*, 371 N.E.2d 456 (1977), 43 N.Y.2d 17, 400 N.Y.S.2d 735; *People v. Fitzpatrick*, 346 N.Y.S.2d 793, 32 N.Y.2d 499, 300 N.E.2d 139.

71. *Smith*, 468 N.E.2d at 894, 479 N.Y.S.2d at 720, 63 N.Y.2d at 71.

V. The New York Death Penalty Statute Is Unconstitutionally Vague

The New York death penalty statute is unconstitutionally vague, creating an impermissible risk of arbitrary application. In general, when interpreting a statute, the court examines whether the plain meaning of the words is ambiguous.⁷² If not, the court's inquiry ends. But if the plain meaning creates "grievous ambiguity, courts apply the "rule of lenity," which requires a narrow reading of the text.⁷³ The New York death penalty statute violates the constitution because it lacks clear guidelines and unambiguous definitions of the alleged crime involved.

The lack of an adequate definition of "serial murder," "common scheme or plan," and the other aggravating factors creates a genuine risk of arbitrariness. For example, Penal Law section 125.27(1)(a)(xi), the "serial murder" clause, allows a prosecutor to seek the death penalty when the defendant "intentionally caused the death of two or more additional persons within the state in separate criminal transactions within a period of twenty-four months when committed in a similar fashion or pursuant to a common scheme or plan."⁷⁴ This clause is unduly vague, as no definition exists to define "similar fashion" or "common scheme or plan." These terms are open to very broad interpretations by individual prosecutors within a given office, let alone the sixty-two counties throughout the state.

Additionally, the statute provides no guidance regarding the date of commission of predicate offenses. Nonetheless, where the predicate offenses (which allow the district attorney to pursue the death penalty) may have occurred prior to the effective date of the statute, the prosecutor should not be able to legally apply such offenses in consideration or calculation of pursuing the death penalty.

In particular, where procedures convey *any* appearance of a risk of arbitrariness, such procedures should be avoided.⁷⁵

This emphasis on risk . . . reflects the fact that concern for arbitrariness focuses on the rationality of the system as a whole, and that a system that features a significant probability that sentenc-

72. See *U.S. v. McCullah*, 76 F.3d 1087, 1108 (10th Cir. 1996).

73. See *U.S. v. Nguyen*, 928 F. Supp. 1525, 1534 (D. Kan. 1996).

74. N.Y. PENAL LAW § 125.27 (McKinney 1993).

75. See, e.g., *Lockett v. Ohio*, 438 U.S. 586, 601 (1978); *Gardner v. Florida*, 430 U.S. 349, 370 (1977) (Marshall, J., dissenting).

ing decisions are influenced by impermissible considerations cannot be regarded as rational.⁷⁶

In *Williamson v. Reynolds*,⁷⁷ the district court held that Oklahoma's death penalty statute was impermissibly vague.⁷⁸ The court stated that a "failure to limit the sentencer's discretion through appropriate objective instructions, combined with Oklahoma's standardless construction of aggravating circumstance[s]," resulted in a violation of the constitutional right to due process.⁷⁹ "A state that imposes capital punishment must apply its laws in a manner that directs the sentencer by 'clear and objective standards' providing 'specific and detailed guidance . . .'"⁸⁰ Clearly New York has failed to provide such critical and specific standards and guidance.

The New York statute creates the same risk as the statute in *Williamson*. No objective instructions exist to guide the New York sentencer. In addition, the lack of definition of the aggravating factors within the statute creates a further risk of arbitrariness.

Walton v. Arizona is another five to four Supreme Court decision where the dissent focussed on the lack of meaningful limits on sentencing discretion.⁸¹ Arizona's statutory language provided no meaningful basis for imposition of a death sentence.⁸² Justice Blackmun chastised the majorities' failure to assess whether Arizona case law confined the terms of the statute to constitutional limits.⁸³

In *Stringer v. Black*,⁸⁴ the Supreme Court reversed a death sentence on the grounds that the existing statute was unconstitutionally vague, in violation of the Eighth Amendment. The Court held that the death penalty statute lacked the necessary guidance and

76. *McCleskey*, 481 U.S. at 323 (Brennan, J., dissenting).

77. 904 F. Supp. 1529 (E.D.Okla. 1995).

78. *See id.* at 1571.

79. *Id.*

80. *Id.* at 1574 (citing *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (holding Georgia Supreme Court's construction of the aggravating circumstances provision of that state's death penalty law unconstitutional)); *see also*, *Shell v. Mississippi*, 498 U.S. 1 (1990) (holding Mississippi's application of its death penalty aggravating circumstance provision unconstitutionally vague); *Maynard v. Cartwright*, 486 U.S. 356 (1988) (holding application of aggravating circumstances provision of Oklahoma's death penalty law unconstitutionally vague); *Caldwell v. Mississippi*, 472 U.S. 320 (1985) (finding that a prosecutor's argument that misleads jurors into believing that the courts, not them, imposed the death penalty violates the constitution).

81. *Walton v. Arizona*, 497 U.S. 639, 697 (Blackmun, J., dissenting) (1990).

82. *Id.* at 706.

83. *Id.* at 707.

84. 503 U.S. 222 (1992).

precision, inviting arbitrary and capricious application.⁸⁵ Similarly, in *Espinosa v. Florida*,⁸⁶ the Supreme Court reversed a Florida death sentence. The vague aggravating factors violated the constitution because they provided little guidance, thus risking arbitrariness.⁸⁷

In *Tuilaepa v. California*,⁸⁸ Justice Blackmun stated in his dissent that the California capital punishment scheme failed to guide the sentencer's discretion.⁸⁹ He continued that one of the greatest evils of unguided discretion is the risk that it will be exercised unconstitutionally.⁹⁰ Justice Blackmun further questioned whether the death eligibility process adequately performed a meaningful narrowing.⁹¹

The Supreme Court has professed a commitment to monitoring discretion in capital cases to minimize arbitrary and capricious action and to achieve principled distinctions between those who receive the death penalty and those who do not.⁹² Future litigation and review will expose the failure of existing factors to adequately guide discretion in capital cases.⁹³ The critical focus is on how the various elements of a death penalty prosecution function together and the rationality and fairness of who ultimately receives the death penalty.⁹⁴

In their dissent in *Arave v. Creech*,⁹⁵ Justices Blackmun and Stevens stated that the Idaho death penalty statute was unconstitutionally vague because it contained a total lack of meaningful guidance for the sentencer.⁹⁶ A limited construction must do more than invite the sentencer to consider, in an unspecified fashion, the individual circumstances of each case.⁹⁷ "[T]he State must provide a construction that, on its face, reasonably can be expected to be

85. *Id.* at 228.

86. 505 U.S. 1079 (1992).

87. See also *U.S. v. Tison*, 90 F.3d 861, 899 (4th Cir. 1996); *U.S. v. McCullah*, 76 F.3d 1087, 1110 (10th Cir. 1996); *Williamson v. Reynolds*, 904 F. Supp. 1529, 1570-71 (E.D. Okl. 1995).

88. 512 U.S. 967 (1994).

89. See *id.* at 984 (citing *Stringer v. Black*, 503 U.S. 222, 235 (1992)); see also *Calins v. Collins*, 510 U.S. 1141 (1994) (stating that the death penalty could never be constitutionally implemented).

90. See *Tuilaepa*, 512 U.S. at 984 (Blackmun, J., dissenting).

91. *Id.* at 989.

92. See *Tuilaepa*, 512 U.S. at 995 (citing *Espinosa v. Florida*, 505 U.S. 1079 (1992)).

93. See *id.*

94. See *id.*

95. 507 U.S. 463 (1993).

96. See *id.* at 479.

97. See *id.* at 480.

applied in a consistent and meaningful way so as to provide the sentencer with adequate guidance.”⁹⁸ This is exactly what the New York statute fails to do by allowing juries to consider unspecified mitigating factors. Without guidance and proper definitions, arbitrary application of capital punishment is inevitable.

No formal death penalty guidelines exist in New York. The lack of coherent and extensive guidelines, coupled with the unduly vague descriptions of eligible crimes, mandate that the statute must fail on constitutional grounds.

VI. New York Prosecutors Must Develop the Necessary Statewide Guidelines to Assist and Guide the Capital Selection Process

The New York death penalty statute fails to establish or provide any procedures or standards to guide the various District Attorneys in their capital decision-making process. Unlike at the federal level, where internal sentencing guidelines supplement the federal statute, neither the State of New York, nor the individual District Attorneys has formalized a policy or procedure for prosecutors to follow. Therefore, there is no actual review of a prosecutor's decision to pursue the death penalty.

In federal capital cases, prosecutorial discretion may be reviewed where the relevant statute provides guidelines for the agency to follow in exercising its decision-making authority.⁹⁹ In January 1995, the Attorney General issued a Protocol to guide federal prosecutors in their decision to pursue the death penalty.¹⁰⁰ The Death Penalty Protocol (“Protocol”) from the United States Attorney's Manual requires United States Attorneys to obtain written authorization from the Attorney General before seeking the death penalty.¹⁰¹ The Protocol provides that a United States Attorney must submit a death penalty evaluation and a prosecution memorandum.¹⁰² Thereafter, the Attorney General appoints a special committee to review these items and make an independent recommendation.¹⁰³ Defense counsel may also submit reasons why the death penalty should not be sought, prior to a recommendation

98. *Id.* at 482.

99. *See Walker v. Reno*, 925 F. Supp. 124, 128 (N.D.N.Y. 1995).

100. *See id.* at 128-29.

101. *See Nicholls v. Reno*, 931 F. Supp. 748, 750 (D. Colo. 1996) (“To request such approval, a United States Attorney *must follow departmental procedure.*”) (emphasis added).

102. *See Walker*, 925 F. Supp. at 129 (citing Protocol at 9-10.000(C)).

103. *See id.* (citing Protocol at 9-10.000(D)); *Nicholls*, 931 F. Supp. at 750-51.

by either the United States Attorney or the committee.¹⁰⁴ The Attorney General then makes the final review and determination as to whether to pursue the death penalty.¹⁰⁵ The Protocol also contains standards to guide the United States Attorney, the committee, and the Attorney General. These standards include assessments of the aggravating factors and other reasons for or against seeking the death penalty.¹⁰⁶

Even if regulations are not published they are still enforceable against the government.¹⁰⁷ Furthermore, where individual rights are affected, "it is incumbent upon agencies to follow their own procedures."¹⁰⁸ In fact, if internal guidelines are more demanding than otherwise required, the agency must adhere to the guidelines.¹⁰⁹ In essence, New York State District Attorneys, by intentionally failing to create, articulate or memorialize any procedures, have attempted to insulate themselves from any review or scrutiny in their decision to pursue the death penalty.

In *Walker*, the Court stated that the Death Penalty Protocol was enacted "to remove unfairness from the prosecutorial process."¹¹⁰ Accordingly, New York should enact equal, if not more rigorous, standards to remove the unfairness from the existing prosecutorial decision process. In *Walker*, the Court upheld the Attorney General's determination largely because no one had alleged that the Attorney General had not followed the prescribed Protocol.¹¹¹ In fact, in the *Walker* case, it appears that the Attorney General meticulously followed each requirement of the Protocol guidelines.¹¹² No such protocol exists in New York.

If anything, New York prosecutors should follow more extensive and rigid standards than their federal equivalent, due to New York's traditional heightened protection of fundamental rights. Instead, New York has failed to enact any such protocol or standards to guide this ultimate decision. New York must not only establish

104. See *Walker*, 925 F. Supp. at 129 (citing Protocol at 9-10.000(D)); *Nicholls* 931 F. Supp. at 751.

105. See *Walker*, 925 F. Supp. at 129.

106. See *id.* (citing Protocol at 9-10.000(G)).

107. See *Zhang v. Slattery*, 55 F.3d 732, 748 (2d Cir. 1995).

108. See *id.* at 749 (quoting *Montilla v. INS*, 926 F.2d 162, 167 (2d Cir. 1991); *Morton v. Ruiz*, 415 U.S. 199, 235 (1974); *Walker*, 925 F. Supp. at 132.

109. See *Walker*, 925 F. Supp. at 132 (quoting *Montilla*, 926 F.2d at 167); *Morton*, 415 U.S. at 235.

110. *Walker*, 925 F. Supp. at 134.

111. See *id.* at 132.

112. See *id.* at 132-33.

similar criteria, but must adopt an equivalent supervisory system, involving several levels of evaluation.

In *Tichnell v. State*,¹¹³ the Maryland Court of Appeals held that the various prosecutors throughout the state did not employ common standards in deciding to pursue the death penalty.¹¹⁴ Similarly, and most importantly, New York prosecutors do not employ common standards in this grave decision-making process. In fact, no standards exist. As previously discussed, prosecutors in individual counties have already expressed their preference with respect to pursuing the death penalty. This preference can, in theory, and does, in reality, vary from county to county.

At a minimum, New York should follow New Jersey's lead and establish statewide death penalty guidelines to assist and guide prosecutors in this most serious procedure. New Jersey has recently confronted the issue of uncontrolled prosecutorial discretion. In *State v. Koedatich*,¹¹⁵ the defendant argued that the New Jersey death penalty statute failed to check the prosecutor's unfettered discretion and therefore could not guarantee that the state would not arbitrarily or capriciously impose the death penalty.¹¹⁶ The defense relied, in part, on the statistical disparity in the selection of cases for capital prosecution from county to county.¹¹⁷ In New York, the disparity not only exists, but is openly acknowledged by the various prosecutors.

In the dissent in *Koedatich*, Justice Handler agreed with the majority that the existing prosecutorial discretion might lead to arbitrary imposition of the death penalty. He stated, however, that such a risk should translate into a mandate for the necessary statewide prosecutorial guidelines for the death penalty determination process.¹¹⁸ Following a discussion of the *McClesky* and *Watson* decisions, Justice Handler stated that:

the lack of guidance with respect to the prosecutor's decision to charge a defendant with capital murder unacceptably increases the danger that the death penalty will be imposed arbitrarily because the needed narrowing function is not provided at this crucial initial stage of a prosecution.

113. 468 A.2d 1 (M.D. 1983).

114. *See id.* at 24.

115. 548 A.2d 939 (N.J. 1988).

116. *See id.* at 951-52.

117. *See id.* at 954; *see also* Hancock, *supra* note 29 at 1558-59 (discussing various studies evidencing the statistical disparities in death sentencing).

118. *See Koedatich*, 548 A.2d at 1019 (Handler, J., dissenting).

Not surprisingly, given the latitude for decision-making allowed by the statute, arbitrary results are emerging.¹¹⁹

Justice Handler referred to the relevant statistics presented in the *Koedatich* case as clearly indicative of the arbitrary consequences of unfettered prosecutorial discretion.¹²⁰ To avoid the potential arbitrary death penalty prosecution and promote uniformity, Justice Handler suggested a statewide standard for deciding whether to pursue a capital murder charge.¹²¹ Without cohesive and comprehensible standards, the statute could not be fairly and impartially imposed.¹²²

In *State v. Marshall*,¹²³ the New Jersey Supreme Court again recognized the potential for abuse or arbitrariness in prosecutorial discretion with respect to capital cases. The majority in *Marshall* reiterated the necessity for formal, statewide guidelines to promote uniformity among prosecutors and safeguard against arbitrary application in the administration of the death penalty.¹²⁴ The court then used as an example the statewide capital guidelines adopted in 1989 as a result of *Koedatich*.¹²⁵

New Jersey contained a noted discrepancy in the death sentencing rate among counties.¹²⁶ Interestingly, this new group of statistics was not compiled by the Public Defender, but by the court's own Special Master and an additional independent expert hired by the State.¹²⁷ Ironically, the *Marshall* Court did not accept as conclusive the findings of the various reports.¹²⁸ In support of its holding, the court referred to a specific report's conclusion that "the notion that prosecutors differ substantially in terms of their personal propensities to seek the death penalty appears implausible."¹²⁹

The self-serving *Weisberg Report*, submitted by the prosecution in *Koedatich*, clearly does not assist the prosecution's position in New York. As discussed earlier, a stated policy difference exists among the current New York District Attorneys. Various prosecu-

119. *Id.* at 1018.

120. *See id.* at 1018-19.

121. *See id.* at 1019, 1022.

122. *See id.*

123. *State v. Marshall*, 613 A.2d 1059, 1103 (N.J. 1992).

124. *See id.* at 1104.

125. *See id.*

126. *See id.*

127. *See id.*

128. *Id.* at 1105 (N.J. 1992).

129. *Id.* at 1106 (quoting the WEISBERG REPORT submitted by the Attorney General).

tors have already expressed their willingness or unwillingness to pursue the death penalty.

As the United States Supreme Court has stated that the mere risk of arbitrary application must be avoided, guidelines clearly are needed. Unless and until no disparity exists among the counties, the mere fact that a crime is committed within a particular county can dictate whether a defendant is put to death. According to both federal and state constitutional law, this is impermissible.

Even if the guidelines adopted by New Jersey prosecutors cured the federal and state constitutional defects in the New Jersey statute, New York has still failed to adopt any such standards. New Jersey prosecutors are required to closely adhere to the statutory requirements and avoid any extraneous influences in their decision-making process.¹³⁰ New York, however, has not adopted any guidelines whatsoever, thus continuing to allow completely unbridled and unchecked prosecutorial discretion in pursuing the death penalty.

In the dissent in *Marshall*, Justice Handler stated that the existing capital scheme fails to meet constitutional standards prohibiting cruel and unusual punishment and demanding exacting procedural protections.¹³¹

This case further confirms that capital punishment cannot be sensibly administered, soundly applied, or rationally managed. Our capital-murder law not only cannot be integrated into our system of criminal justice, it serves to weaken and distort it. The conclusion is irresistible: capital punishment is unconstitutional, unwise, and untenable. It should be abandoned.¹³²

Justice Handler acknowledged that capital punishment is a matter of particular state interest and does not require a uniform national policy.¹³³ Within a state, however, the governing principles for sentencing are uniformity and evenhandedness.¹³⁴ Although some discretion and latitude is tolerated in certain sentencing contexts, arbitrary and capricious application of capital punishment is absolutely unacceptable.¹³⁵ The New Jersey Supreme Court has concluded that the state constitution's cruel and unusual punish-

130. See *id.* at 1107.

131. See *id.* at 1120.

132. *Id.*

133. *Id.*, at 1123 (citing *State v. Ramseur*, 524 A.2d 188 (N.J. 1987) (Handler, J., dissenting)).

134. See *id.* at 1124.

135. See *id.* at 1125 (citations omitted).

ment clause affords greater protection to capital defendants than its federal Eighth Amendment counterpart.¹³⁶

The statute with its serious flaws of overbreadth, vagueness, and the blurring of decision-making, to which may be added unchecked prosecutorial discretion, is grossly defective if it cannot provide an ultimate fail-safe that could otherwise rectify individual injustice and spare the life of a defendant improvidently sentenced to death.¹³⁷

Similarly, New York has traditionally afforded greater protections of its citizens than the federal constitution. Accordingly, New York should follow New Jersey's lead and strike down the current death penalty statute as unconstitutional. Although prosecutors are vested with the initial authority to determine whether to pursue death as a punishment, they should not have ultimate unchecked power.¹³⁸ Thus, additional guidelines and safeguards must exist at this initial level. As Justice Handler stated,

our current decentralized system of capital prosecution is rife with potential for prosecutorial abuse of power. Prosecutors exercise their capital charging authority with almost no supervision, and the decisions they make are often highly idiosyncratic. All data collected to date reveal that prosecutors seek the death penalty for death-eligible defendants with little consistency or predictability.¹³⁹

In his dissent in *State v. Jackson*, Justice Handler stated that the case exemplified and documented how prosecutorial discretion in determining death eligibility was "unprincipled and unguided."¹⁴⁰

Prosecutorial charging practices are so inconsistent and disparate that the end results have become irretrievably arbitrary and capricious. The Court . . . should set clear and objective standards governing the prosecutorial charging responsibility and prescribe firm procedures, including judicial review, to assure that the prosecutorial role in determining death eligibility is soundly, fairly, and consistently exercised. . . . Prosecutors are vested with initial authority to decide that a defendant deserves to die for his or her crime. . . . [I]n the exercise of that authority prosecutors are completely unsupervised and their decisions un-

136. See *id.*, at 1126 (citing *State v. Gerald*, 549 A.2d 792 (N.J. 1988)).

137. *Id.* at 1128 (citing *Ramseur*, 524 A.2d 188, (Handler, J., dissenting)).

138. See *id.* at 1131.

139. *Id.*

140. *State v. Jackson*, 607 A.2d 974, 975 (N.J. 1992) (Handler, J., dissenting).

fathomable. . . . That early general concern over inconsistent prosecutorial charging practices has been a repeated refrain.¹⁴¹

Justice Handler acknowledged that every County Prosecutor had adopted statewide guidelines for capital determinations, but believed that such guidelines still failed to meet federal and state constitutional standards.¹⁴² The "substantive standards of the guidelines [we]re vague and unfocused."¹⁴³ They failed to provide "effective procedures to assure consistent and sound decision making."¹⁴⁴ Ultimately, the guidelines provided totally unsupervised discretion to prosecutors in determining whether to pursue death.¹⁴⁵ To remedy the potential for disparate treatment resulting from such standardless and unguided prosecutorial decision-making, the court mandated statewide capital guidelines for prosecutors.¹⁴⁶

New Jersey has at least attempted to confront the problem of unfettered prosecutorial discretion in death sentencing. Although the current guidelines do not adequately confront the lack of guidance or clear direction, they are a positive development. New York has yet to mandate the necessary standards, nor have the various District Attorneys voluntarily adopted the appropriate guidelines. Accordingly, the New York death penalty statute remains unconstitutional.

In New Jersey, and more so in New York, the lack of procedures for structuring a prosecutor's capital charging decisions further underscores the arbitrariness of the present system.¹⁴⁷ Even if the existing guidelines were completely followed, prosecutors inevitably must make decisions based in part on their own biases.¹⁴⁸ "Thus, arbitrariness in charging and, eventually, in sentencing is inescapable even if the guidelines are followed rigorously and conscientiously by every single prosecutor in the state."¹⁴⁹

141. *Id.* at 975, 977.

142. *See id.* at 978.

143. *Id.*

144. *Id.*

145. *Id.*

146. *See id.* at 984 (citing *State v. Lagares*, 601 A.2d 698 (N.J. 1992)).

147. *See id.* at 983 (Handler, J., dissenting).

148. *See id.*

149. *Id.*

VII. At a Minimum, the Defendant Is Entitled to a Hearing to Ensure that the Death Penalty Has Not Been Pursued in an Arbitrary Fashion

Even if the New York statute, with its total absence of requisite prosecutorial guidelines, could survive federal and state constitutional challenges, the defendant should be entitled to a hearing to determine the process employed by the prosecutor in deciding to pursue this most final and severe punishment. Since the prosecutor has complete discretion at the first level, the defendant should have the right to a hearing on whether any measures were taken to ensure that the decision to seek the death penalty was not made arbitrarily.

In *State v. McCrary*,¹⁵⁰ the court held that the defendant was entitled to hearings to determine the validity of aggravating factors upon receipt of a death penalty notice.¹⁵¹ The review established in *McCrary* has already nullified one defendant's exposure to capital sentencing.¹⁵²

The potential for abuse or arbitrariness in the capital decision process, coupled with the grave and final consequences of such a decision, requires judicial scrutiny of the prosecutorial charging process.¹⁵³ Accordingly, a court should allow the potential capital defendant, once he has been served with capital notice, the necessary hearing to challenge the determination.¹⁵⁴

The evidence and justifications for this "life-and-death decision must be fully exposed."¹⁵⁵

Minimally, the proper discharge of the charging responsibility requires clear and fair procedures entailing recourse to genuinely probative evidence, integrity of the record, *full explanations of determinations*, internal review, and centralized coordination and supervision.¹⁵⁶

150. 478 A.2d 339 (N.J. 1984).

151. *See id.* at 343-44.

152. *See State v. Marshall*, 613 A.2d 1059, 1119 (citing *State v. Matuelewicz*, 557 A.2d 1001 (N.J. 1989)).

153. *See id.*

154. *See id.* (citing *State v. McCrary*, 478 A.2d 339 (N.J. 1984)).

155. *State v. Jackson*, 607 A.2d 974, 984 (N.J. 1992) (Handler, J., dissenting) (citing *State v. Smith*, 495 A.2d 507 (N.J. 1985) (holding that defendant was "entitled to discovery on criteria and procedure" of capital selection by prosecutor to support claim of arbitrary and capricious charging)).

156. *Id.* at 984 (emphasis added).

The "portentous consequences" of the death penalty warrant greater restrictions on prosecutors than in typical criminal cases.¹⁵⁷ A capital defendant is entitled to a hearing to ascertain if the District Attorney's decision was an arbitrary and capricious exercise of prosecutorial discretion.¹⁵⁸ Given the stakes, such a hearing is a minimal intrusion into the area of prosecutorial discretion.¹⁵⁹

VIII. Conclusion

The *Hale* court has taken an important step in holding the existing death penalty guilty plea regulations unconstitutional. New York State's death penalty statute provides unrestricted prosecutorial discretion to pursue the death penalty. This standardless and unfettered discretion creates the risk of arbitrary and discriminatory application of capital punishment in violation of the constitutional prohibition against cruel and unusual punishment.

Further, the statute is unconstitutionally vague in that it fails to provide an adequate definition of serial murder under P.L. section 125.27 (1)(a)(xi). The existing statute must fail as a result of this unconstitutional vagueness, especially considering the severity and finality of the punishment.¹⁶⁰

New York should follow the example of New Jersey and establish procedures and standards to guide the various prosecutors in their capital decision-making. New York should also follow federal law, which has extensive internal guidelines that supplement the federal statute in guiding prosecutors' decisions to pursue the death penalty.

In the alternative, a preliminary hearing is necessary to ascertain whether the decision to pursue the death penalty adhered to the proper standards, if any standards exist. Such a hearing is imperative to determine whether the death penalty has been pursued in an arbitrary fashion.

157. *See id.* (citing *McCrory*).

158. *See id.*

159. *See id.*

160. U.S. CONST. amend. VIII.

THE FUTURE OF LEGAL SERVICES: LEGAL AND ETHICAL IMPLICATIONS OF THE LSC RESTRICTIONS

Foreword

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In 1974, Congress created the Legal Services Corporation ("LSC") to provide low income people with legal representation in civil matters. Over the past twenty-three years, LSC-funded organizations successfully represented victims of fraudulent loan schemes, waged court battles over the delivery of medical services to the elderly and the poor, and championed the rights of children.¹

Despite its many successes, the LSC fell victim to the conservative revolution of the 104th Congress and its attempt to "defund the left."² The conservative restrictions on the LSC were the culmination of hostilities that had been building since the early 1980s. During the first term of the Reagan Administration, a proposal was made to replace the LSC with increased *pro bono* efforts from the private Bar. Although this early initiative failed, LSC funding was cut by approximately 25%. The erosion of funding was especially significant in light of other reductions in social welfare programs.³ In fact, a 1983 survey conducted by the Washington Council of Lawyers found that as a result of reduced funding: (1) local legal

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1. See David Barringer, *Downsized Justice*, 82 A.B.A.J. 60, 64 (1996).

2. 142 CONG. REC. H8149-04, H8185 (remarks by Hon. Robert Dornan, R-Ca).

3. See JOHN A. DOOLEY & ALAN HOUSEMAN, *LEGAL SERVICES HISTORY* 25 (1984).

services programs lost up to 30% of their staff attorneys; (2) 85% of the local programs closed at least one office; and (3) 87% of the local programs were forced to decline the representation of up to 4000 potential clients.⁴

Congress adopted further funding cuts in 1995, reducing the total LSC budget 30%, from \$400 million in fiscal year 1995 to \$278 million in fiscal year 1996. Moreover, just as the 1981 budget cuts had done before, the recent cuts had an immediate negative impact on local programs. In Maryland, for example, the Legal Aid Bureau lost \$1.4 million in funding, and subsequently had to reduce its staff from 143 lawyers and 80 legal assistants to 92 lawyers and 57 legal assistants.⁵ Neighborhood Legal Services in Washington, D.C., laid off nearly half its staff, closed three offices, and eventually may eliminate up to 50% of its services.⁶ Some legal aid providers have had to shut down altogether.⁷

In the wake of devastating funding cuts, Congress further hobbled the LSC by implementing extensive restrictions on the kinds of services local organizations could provide with either the federal funds *or* private donations.⁸ At a time when recent welfare reform legislation⁹ makes it particularly important for poverty lawyers to be active, the restrictions proscribe a wide variety of legal tools previously available to these lawyers, including welfare reform lobbying¹⁰ and participating in class actions.¹¹ The restrictions also prohibit legal representation of immigrants,¹² prisoners,¹³ and public housing residents who face drug charges.¹⁴ As a result of these constraints, serious questions have arisen over whether lawyers si-

4. See WASH. COUNSEL OF LAWYERS, REPORT ON THE STATUS OF LEGAL SERVICES FOR THE POOR (1983).

5. See 142 CONG. REC. E1380-03.

6. See Barringer, *supra* note 1, at 61.

7. See *id.*

8. See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504, 110 Stat. 1321, 1321-53 (1996) [hereinafter Act of 1996]. Congress re-enacted the restrictions in substantially unchanged form in the Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 502, 110 Stat. 3009, 3009-59 (1996), and the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-119, § 502, 111 Stat. 2440, 2510 (1997); see also 62 Fed. Reg. 27,695 (1997) (codifying recent regulations promulgated by LSC).

9. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105.

10. See Act of 1996, § 504(16).

11. See *id.* at § 504(7).

12. See *id.* at § 504(11).

13. See *id.* at § 504(15).

14. See *id.* at § 504(17).

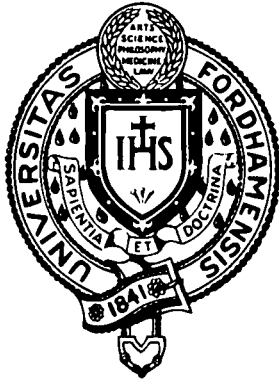
multaneously can honor these restrictions and provide the zealous advocacy required of all attorneys. Under the restrictions, what strategies can legal services lawyers use to effectively advocate for the poor? Is it constitutional for the federal government to silence the voices of the poor and disenfranchised? What ethical obligations do lawyers have to their clients in spite of the restrictions?

The Future of Legal Services: Legal and Ethical Implications of the LSC Restrictions seeks to address these issues of lawyering under the restrictions. We organized the conference as part of Fordham's Advanced Seminar in Ethics and Public Interest Law. We comprised a student working group in the class who worked to organize the conference with the Legal Aid Society and the Stein Center for Ethics and Public Interest Law. The conference, held on May 30, 1997, brought together practitioners, academics, and law students to discuss the delivery of legal services under the federal restrictions. In the remarks that follow, participants address the issues germane to lawyering under the restrictions and provide their own insights into the future of legal services for the poor.

The works that follow are organized in the format used at the conference. This includes addresses by Alan W. Houseman and Alexander D. Forger, and four panels,¹⁵ presented in the following order: (1) Legislative Issues: Alexander D. Forger, Alan W. Houseman, Dwight Loines, and Dennis J. Saffran; (2) Implementation Issues: Lucy Billings, Valerie J. Bogart, and Jill Ann Boskey; (3) Constitutional Issues: Eric M. Freedman and Steven R. Shapiro; and (4) Ethical Issues: Helaine Barnett, Stephen Ellmann, Stephen Gillers, and Emily J. Sack.

We are indebted to all the participants for giving generously of their time and expertise. We also graciously thank Professors Matthew Diller and Russell Pearce of Fordham University School of Law, as well as Scott Rosenberg and April Newbauer of the Legal Aid Society, for their invaluable support and guidance on this project.

15. At the speakers' request, the following remarks do not include those by Shirley Traylor and John O. Mc Ginnis.



OPENING REMARKS*

JOHN D. FEERICK:

On behalf of Fordham Law School and the Fordham University community, I am obviously very pleased to welcome you to this very timely and important conference on “The Future of Legal Services: Legal and Ethical Implications of the LSC Restrictions.”

I would like to certainly congratulate and commend The Legal Aid Society, and obviously the students and faculty of our School, for bringing together such an outstanding group of panelists and moderators to focus on achieving justice for the poor and those of limited means.

I wish to acknowledge the presence of Alexander Forger, who just a few weeks ago received in this very room our Law School’s Louis J. Lefkowitz Award for his extraordinary public service. I noted on the occasion that Alex is a sterling example of the difference one person can make in the life of a community. It’s always a great honor for our School when Alex can be here.

I also want to particularly salute Professors Matt Diller and Russell Pearce of our faculty — and obviously, there are others as well who are very much involved in the subject of legal services, but, in particular, those two professors — for making the kinds of subjects that you deal with today a central part of their work in the academic community.

In a *UCLA* article a few months ago dealing with the subject of “Disability in a Social Welfare System,” Professor Diller reminded us that the tensions and dynamics we deal with in this area “can only be resolved by breaking through the belief that the poor represent a hostile threat to society so that the public views assistance to the poor as an acknowledgment of human dignity rather than a threat to the social fabric.”¹

Samuel Johnson, the great eighteenth century writer and lexicographer, once noted that “decent provision for the poor is a true test of a civilization.”² This ideal has been one of the cornerstones of our nation and, in large measure, has defined the best of American civilization, particularly in the last half of the twentieth century.

* EDITOR’S NOTE: This transcript has undergone minimal editing to remove the cadences of speech that appear awkward in writing.

1. Matthew Diller, *Entitlement and Exclusion: The Role of Disability in the Social Welfare System*, 44 *UCLA L. REV.* 361, 465 (1996).

2. JAMES BOSWELL, *LIFE OF SAMUEL JOHNSON* 423 (Edmond Malone ed. 1927).

Like any virtue, however, its daily existence depends on the constant nurturing and cultivation of men and women of conscience and commitment. Like other creations of the human spirit, a decent provision for the poor is continuously threatened by forces of cynicism and indifference. All too often, it becomes an unwilling victim of the political process.

At the present time, in fact, as you well know, there exists in this country a formidable challenge to the concept that all Americans, regardless of economic status, are equal under the law. We have seen, alarmingly, the progressive dismantling of a system of legal services, which in many cases is the only voice for a large number of our fellow citizens.

We also have been reminded by recent events that promising equality and justice while denying the means of achieving those ends is a guarantee which rings hollow and requires us to examine our commitment to our stated ideals as a free people. This conference, therefore, becomes an important part of this examination. In a very real sense it is a ringing statement by all of you that justice should not be a privilege of wealth, but a right guaranteed and delivered to all.

Our School is truly honored by your presence and inspired by your commitment to the underprivileged through your work with and support of legal services for the poor. I salute you and wish you a very successful conference.

ADDRESS: INTERPRETATION OF LSC RESTRICTIONS

MATTHEW DILLER:

Before I introduce our keynote speaker, Alan Houseman, I want to say one or two more words about how this conference came to be and the sponsors of the conference.

The conference is sponsored by the Stein Center on Ethics and Public Interest Law here at Fordham, founded in 1992 through the generosity of Louis Stein, Class of 1926, and also jointly sponsored by The Legal Aid Society, which is the oldest provider of civil legal services to the poor in the country, and also one of the largest, if not the largest, to this day.

This conference grew out of a course taught by Professor Pearce and myself, a seminar of ethics and public interest law, in which the students worked in groups with different public interest organizations around the City on particular topics and projects. One group focused on the recent enactment of restrictions on organizations that receive funding through the Legal Services Corporation. That student group took the lead in organizing this conference, both from the conceptual start of what issues should be discussed, down to the smallest details of will there be water on the table for the panelists. I want to acknowledge their fabulous contribution in making this event happen. They are Steve Epstein, Eric Fields, Staci Rosche, and Jack Pace. There are three of them there. Eric is probably outside — he's up in the booth. Staci and Steve you will hear from in actually just a few minutes, as they moderate two panels on today's program.

I also want to thank Helaine Barnett for really helping this collaboration between Fordham Law School and The Legal Aid Society take off. This is our second year in working with The Legal Aid Society on this course. Last year, the students organized a very successful conference on representing tenant groups. We are thrilled with this collaboration and hope that it deepens and develops.

This year the students also worked with New York Lawyers for the Public Interest, with the City Bar Association, with Brooklyn Legal Services — I'm probably leaving out someone — with the Welfare Law Center. We look forward to working with other groups around the City as well.

Finally, before I move on, I just want to note that next November 5th and 6th we will be having another conference here at Ford-

ham Law School.¹ I forget the exact working title, but it will be more generally on the future of poverty law as we move into the years ahead. You'll be hearing more about that as it develops.

I want to introduce our keynote speaker, Alan Houseman. Alan Houseman is the Director of CLASP, the Center for Law and Social Policy, which is one of the principal public policy and legal organizations that focuses on the problems of low-income families with children and securing access to justice for low-income Americans. Mr. Houseman is Counsel to the National Legal Aid and Defender Association and the Project Advisory Group. He is a nationally known expert on legal services to the poor. He has worked on anti-poverty policies for over thirty years, written numerous articles and publications on legal services and poverty law, and served as counsel to the legal services community. Between 1976 and 1981, he was a member of the senior staff of the Legal Services Corporation, where he directed the Research Institute. Prior to that, Mr. Houseman was founder and Director of Michigan Legal Services. Between 1973 and 1976, Mr. Houseman was one of two principal representatives of legal services who lobbied for the creation of the Legal Services Corporation. Currently he continues active involvement in the congressional actions on the Legal Services Corporation and provides guidance and assistance to the legal services programs that are funded through LSC. He also focuses on the long-term future of the legal services program and innovative anti-poverty policies for the future. I give you Mr. Houseman.

ALAN W. HOUSEMAN:

Thank you.

It is a great pleasure to be here at Fordham and to hear your terrific Dean, who has helped make Fordham one of the premiere public interest law schools in the country. As most of you know, every year at the National Association of Public Interest Law Annual Conference in Washington, D.C., it is reported that Fordham Law School consistently raises more funds for student public interest work. You should be proud!

I also want to thank the students for putting on this conference, for it offers an opportunity to focus on some very difficult questions that we face in legal services. Finally, it is always a privilege

1. Symposium, *Lawyering for Poor Communities in the Twenty-First Century*, 25 FORDHAM URB. L.J. (forthcoming, May 1997). The symposium was held at Fordham University School of Law on November 6 and 7, 1997.

to be present with Alex Forger, Helaine Barnett, and others in the audience.

My job today is to set a framework for the discussions on the four panels. I will begin by discussing what has happened in the 104th Congress, describe what can and cannot be done under the restrictions imposed by that Congress, and then frame the context for the later discussions. In doing so I will be using some overheads.

When we think about what has happened in the 104th Congress to legal services, one has to first understand what it was before, what it looks like afterwards, and take into account three sets of decisions that Congress made: funding decisions, structural decisions, and restrictions.

If you look at the chart, you will see what the program looked like in 1995, and what it then began to look like in 1996. Obviously, there were severe funding reductions. Beginning in 1995, the original budget was \$415 million. There was a recision of \$15 million. In 1996, the funding was cut back to \$278 million and increased to \$283 million in 1997.

Note also that the amount of non-LSC funds that were distributed to LSC funded programs went down from approximately \$254 million to \$209 million. It should be noted that the total amount of non-LSC funding did not go down; however, the amount that was received by LSC funded programs went down. The total amount of non-LSC funding in fact went up.

One of the consequences of the funding reduction and the imposition of restrictions is the development of a dual delivery system in parts of the country. We now have twelve states where there are two sets of full-service providers, one funded by LSC and one funded by non-LSC sources — something akin to the funding of the Legal Aid Society and Legal Services for New York City. In addition, twenty-six other cities have developed a dual delivery system. By “dual,” I mean a full-service provider delivery system, not just an entity that does one or two kinds of cases or activities.

The decisions of the 104th Congress also eliminated the entire infrastructure of legal services. Prior to 1996, the infrastructure consisted of national and state support centers, the National Clearinghouse (which publishes *the Clearinghouse Review*) regional training centers, and a few other entities. Congress stopped funding these entities and, collectively, they lost about \$25 million.

Many of these programs are still in existence. However, there are no longer any regional training centers; state support units have

Chart A

Funding Decisions, Structural Decisions, and Restrictions

	1995	1996 & 1997
FUNDING	LSC: \$415 million \$400 million (after rescision) Non-LSC: \$254 million TOTAL: \$654 million	LSC: \$278 million in '96 \$283 million in '97 Non-LSC: \$209 million in '96 (\$209 million estimate in '97) TOTAL: \$487 million in '96 TOTAL: \$492 million in '97
STRUCTURE	292 Basic Field Programs 32 Native American Grants 50 Migrant Grants 8 Supplemental Field Programs 16 National Support Centers 1 National Clearinghouse 50 State Support Units 5 Regional Training Centers 6 CALR ¹ Units	281 Basic Field Programs 32 Native American Grants 50 Migrant Grants 0 Supplemental Field Programs 0 National Support Centers 0 National Clearinghouse 0 State Support Units 0 Regional Training Centers 0 CALR Units
STAFFING	9561 FTE ²	8324 FTE (-12.9%)
OFFICES	1064	929 (-12.7%)
CASES (Open & Closed)	2,161,936	1,846,447 (-14.6%)

¹ CALR is an acronym for Computer-Assisted Legal Research.² FTE is an acronym for Full Time Employees.

been cut by about half; at least two national support centers are no longer in existence, and several are just barely surviving.

These funding reductions had an impact, obviously, on the kind of services that can be delivered. If you look at numbers, you will see that the number of staff in the program has gone down approximately 12.9 %. The number of full-time offices has also been reduced. The cases opened and closed have gone down as well.

Now let's turn to the restrictions of what legal services can do. First note that there were restrictions on LSC funds and on private funds prior to the 104th Congress. However, there were no restrictions on non-LSC public funds and some restrictions on non-LSC

private funds. As a consequence, even though there were restrictions on what you could do with LSC dollars, most programs in the country — not all, but many at least — had non-LSC dollars. Recipients could undertake a full range of advocacy with non-LSC dollars. That is no longer the case if you're an LSC-funded program. An LSC-funded program now can only do certain activities with its funds.

The Congress added a number of restrictions on what a recipient of LSC funds can do. However, to understand what has and what hasn't happened, it's important and necessary to look at what can still be done in legal services programs funded by LSC.

As the list indicates, much of the work that has gone on nationally in legal services can still go on, and most of the cases that were done in 1995 can be done in 1997. So in one sense, the restrictions have not substantially altered the basic work that most legal services programs around the country can continue to do.

- For example, economic development work and group representation can continue. There are no limits on group representation with non-LSC funds. The old limits that were in effect in 1995 are in existence still; they haven't been changed by the restrictions of the 104th Congress.

- You can still represent clients before administrative agencies in administrative proceedings that adjudicate clients' rights.

- You can still sue government entities. It is true that you can't initiate a class action any longer. The regulations define a class action as an action brought under Rule 23 or equivalent state rule.² In a number of states, there are procedures that have class impact but that are not Rule 23 class actions. Those are still permitted activities. Thus, LSC funded programs can still sue governmental entities to obtain injunctive or declaratory relief.

- LSC funded advocates can work to change agency practices and can participate in systematic efforts to enforce laws.

- LSC funded advocates can undertake community legal education programs. The solicitation restriction,³ as interpreted by LSC, does not prevent outreach and community education activities that many legal services programs have historically done. Moreover, the LSC regulation permits LSC providers to continue to act as ombudsmen at either the state or local level under both governmental and private ombudsman's programs.

2. See FED. R. CIV. P. 23.

3. See 45 C.F.R. § 1638 (1998).

Chart B

Activities Still Allowed by LSC Funded Programs

Over 95% of the work done in legal services in 1995 can continue in 1997 and over 98% of the cases brought to court in 1995 could be brought in 1997.

- all evictions and federal housing cases;
 - bankruptcy, collections and repossessions, consumer debt, fraud, warranty and utility cases;
 - family law matters such as child support, domestic violence, custody, visitation, divorce/separation and paternity establishment;
 - foster care, termination of parental rights and child welfare matters;
 - elderly and disability advocacy;
 - migrant and Native American matters;
 - employment discrimination, wage claims and unemployment insurance;
 - income maintenance cases including Medicaid, food stamps, AFDC, SSI, SSA and Veterans Benefits;
 - education;
 - health including Medicare;
 - juvenile matters;
 - individual rights including mental healthy; and,
 - most aliens including those battered or subjected to extreme cruelty.
-

Economic development work and group representation can continue.

Clients can be represented before administrative agencies in administrative processes that adjudicate the client's rights.

LSC-funded recipients can still sue governmental entities.

Recipients can also work to change agency practices.

Recipients can participate in efforts to enforce laws.

Recipients can undertake community legal education (CLE) programs.

Recipients can use non-LSC funds to seek funds from State or local legislative and administrative bodies.

Recipients can use non-LSC funds to prepare oral or written comments in a public rulemaking proceeding.

Recipients can use non-LSC funds to respond to a written request for information or testimony from a government agency, legislative body or elected official.

- Advocates can continue to do legislative advocacy. LSC recipients can use non-LSC funds to seek funds from state or local legislatures and administrative bodies.

- Advocates can continue to participate in rule-making. LSC recipients can use non-LSC funds to prepare written or oral comments in a public rule-making proceeding, which is any rule-making proceeding — state, local, or federal.

- Finally, LSC recipients can use non-LSC funds to respond to written requests for information or testimony from government agencies, legislative bodies, or elected officials. A considerable amount of legislative advocacy that has gone on in the past using non-LSC funds is still permissible.

In light of what can be done, let's look at what can't be done.

First, the program announcement contains an error. There is no prohibition on filing fee-generating cases. Earlier versions of the legislation had such a prohibition, but the final legislation did not.

The compromise between the House and the Senate on this issue provides that recipients cannot claim, collect, or retain attorneys' fees in cases initiated after April 25, 1996.⁴ LSC programs can bring the case but cannot seek fees in those cases by the recipient. LSC programs can continue to claim, collect, and retain attorneys' fees in cases pending or initiated by April 26th, including welfare reform cases and class actions.⁵ Thus, if an LSC recipient had a welfare reform case or a class action and it was pending on April 26th, the program could continue to collect the fees until the time until the program withdrew from that case.

This restriction does not apply to cases in which a recipient is appointed by a court, or payment is made pursuant to a government grant or contract, fees from court sanctions, and to reimburse costs and expenses. Moreover, it's quite clear that recipients may co-counsel with non-LSC funded attorneys or pro bono attorneys, and those non-LSC attorneys can seek attorneys' fees in the co-counseled cases.

Even so, this restriction on attorneys' fees has two consequences for programs: it limits the amount of funding for programs; and it takes away a leverage point that lawyers can use when negotiating with the other side.

One of the most onerous of the restrictions is the welfare reform prohibition.⁶ The basic rule is that recipients can't challenge state or federal welfare reform laws.⁷ LSC has been interpreted to prohibit recurrent challenges to the provisions of the Personal Re-

4. See 45 C.F.R. § 1642.3 to .4.

5. See 45 C.F.R. § 1642.5.

6. See 45 C.F.R. § 1639 to 1639.3.

7. See 45 C.F.R. § 1639(a).

sponsibility and Work Opportunity Reconciliation Act,⁸ except for the child support provisions. LSC recipients cannot challenge state laws or regulations adopted pursuant to notice-and-comment rule-making (to implement the Personal Responsibility Act) and they can't challenge state general assistance program laws or formally adopted regulations.⁹

However, there are two exceptions that are very important:

- First, recipients can use non-LSC funds to comment in a public rule-making proceeding and can use non-LSC funds to respond to requests from legislators, elected officials, or administrative agency officials about welfare reform laws, regulations, or policies.¹⁰ In a number of areas across the country, legal services programs have been able to be involved in the state implementation of the Personal Responsibility Act.

- In addition, recipients can represent an individual client who is seeking relief from a welfare agency because of the threatened adverse action based on the welfare reform law, regulation, or policy.¹¹ In such representation, an LSC-funded program can raise most of the legal issues that normally would be raised and they can challenge agency policies and practices as violative of the law or the Constitution. What they can't do is challenge a statutory law or regulations that have been adopted pursuant to notice-and-comment rule-making.

This interpretation of the welfare reform prohibition presents one of the most difficult ethical issues that you're going to discuss later. There will be cases where the only way a lawyer can effectively vindicate an individual client's right is to challenge a regulation or policy as violative of a higher law or the Constitution.

How, then, in that context do you provide effective representation? Does it mean that you have to decline all representation in these cases? Can you narrow the scope of your representation and stay within ethical precepts?

Another critical restriction prohibits recipients from participating in civil litigation on behalf of persons incarcerated in a federal, state, or local prison.¹² That has been interpreted to prohibit programs from engaging in civil litigation in court on behalf of a pris-

8. Pub. L. 104-193, Aug. 22, 1996, 110 Stat. 2105 (codified as amended at 42 U.S.C. § 601).

9. See 45 C.F.R. § 1639.2-.3.

10. See 45 C.F.R. § 1639.5.

11. See 45 C.F.R. § 1639.4.

12. See 45 C.F.R. § 1637.1.

oner who is actually in a prison or jail, and to prohibit participating in administrative proceedings challenging conditions of incarceration.

However, programs can represent prisoners in administrative proceedings that don't involve conditions of incarceration. Programs can also provide advice and non-litigation-type services to prisoners. Furthermore, if a client is arrested after civil representation has commenced and is incarcerated for brief periods of time, *i.e.* three or four months, programs do not have to stop representation in that case. Programs can continue such representation if the incarceration doesn't interfere with the representation. However, if the incarceration is going to be longer than three to four months, then programs would have to take steps to withdraw from the case.

Two other restrictions have a bearing on the subsequent ethical discussions. First is the new provision that requires programs to identify potential clients by name to the defendant if the program is going to file litigation or engage in pre-complaint settlement negotiations where litigation is anticipated.¹³ In addition, programs are required to obtain a written statement of facts from any plaintiff/client if they are going to litigate on behalf of that client or enter pre-complaint settlement negotiations with the anticipation of litigation.¹⁴

These provisions initially caused considerable worry, but LSC has interpreted the provision to minimize the harm.

- First, the request doesn't apply in emergency situations.
- Second, programs need only identify the plaintiff by name to the defendant; programs don't need to identify the plaintiff to anybody beyond the defendant.
- Third, the written statement of facts need only include the information included in the complaint, at least in most circumstances.
- Finally, adverse parties cannot obtain access to the information included in the statement of facts. The LSC regulation makes it quite clear that the statutory provision does not create a new right of access. Any right of access is governed solely by the law and discovery rules of the court in which the action is brought.

The second restriction that raises ethical concerns is the statutory provision on access to records.¹⁵ The legislation gives LSC monitors and auditors access to financial records, time records, retainer agreements, client trust fund and eligibility records, and cli-

13. *See* 45 C.F.R. § 1636.2.

14. *See* 45 C.F.R. § 1636.2.

15. *See* 45 C.F.R. § 1619.2.

Chart C

Activities Not Allowed by LSC Funded Programs

	1995	1996 & 1997
RESTRICTIONS	LSC FUNDS	ALL FUNDS OF A RECIPIENT
	abortion redistricting undocumented and other aliens advocacy training self help lobbying class action can recover attorneys' fees rulemaking legislative contact on behalf of client welfare reform advocacy prisoner representation all public housing cases could solicit if not for pecuniary gain treated like other lawyers	abortion redistricting undocumented and other aliens advocacy training class actions recovery of attorneys' fees in new cases representation in administrative rulemaking welfare reform representation undocumented aliens drug related public housing evictions solicitation Statement of Facts before negotiation or filing suit
	NON-LSC FUNDS (\$240M)	NON-LSC FUNDS
	all aliens all lobbying rulemaking class actions attorneys' fees welfare reform advocacy prisoner representation all public housing cases solicitation if no pecuniary gain treated like all lawyers	State/Local self-help lobbying Comment in Public Rulemaking Response to requests of legislative and administrative bodies
	PRIVATE FUNDS	
	abortion redistricting advocacy training	
	PUBLIC & IOLTA FUNDS (\$172M)	
	abortion redistricting advocacy training	

ent names if they appear in those records, unless the information in those records is protected by the attorney-client privilege. As a consequence, the ethical rules on client confidentiality, which are considerably broader than the attorney-client privilege in most states, would not prevent LSC monitors and auditors from obtaining access to this information.

The practical problem for programs is whether they can develop financial records, time records, client trust fund and eligibility records, and even retainer agreements, to minimize any confidential information that's included within such records. In many cases, legal services programs have been able to design their financial records so that neither client names nor confidential information is included within those records.

Moreover, monitoring is no longer done by LSC staff; it is done by local program auditors who are hired by the local program and are in privity with the local program. In most states, auditor access doesn't create an ethical conflict. Very rarely does LSC ask for information that would be subject to the confidentiality rules.

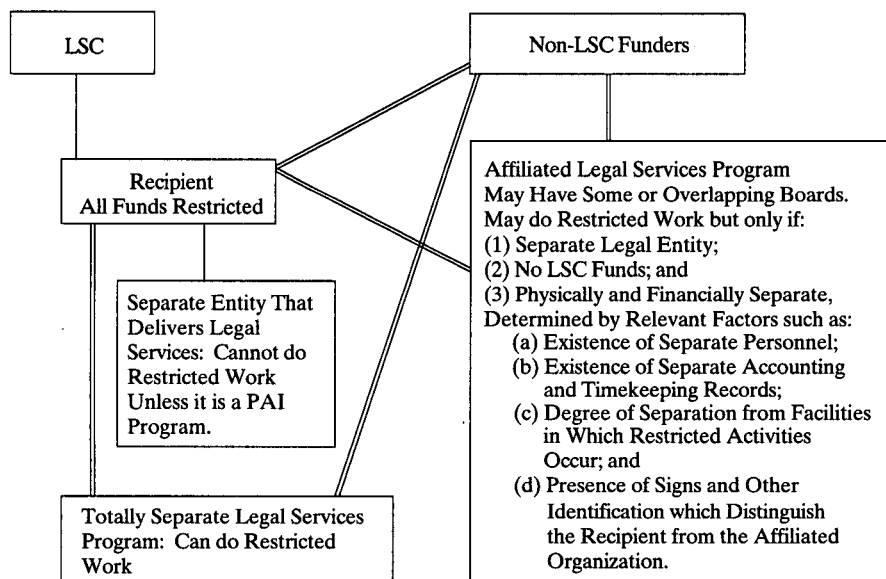
Next, I would like to set the framework for two more discussions that we're going to have today by looking at several more diagrams. First is a diagram about Part 1610 of the LSC Regulations, 45 C.F.R. 1610.¹⁶ This Regulation was adopted by the Corporation in an effort to win the litigation that has been brought in Hawaii by five legal services programs. The Federal District Court held that the restrictions created an unconstitutional condition because LSC-funded recipients couldn't exercise their First Amendment rights through an affiliated organization or some other independent entity under the provisions of the LSC policy on interrelated organizations and the interim regulation Part 1610.¹⁷

In response, the LSC Board adopted new regulations that would permit a recipient to set up an affiliated legal services program and carry out restricted activities through that affiliate, so long as the funds that went to that affiliate from the recipient were non-LSC funds.

16. See 45 C.F.R. § 1610 (implementing statutory restrictions on the use of non-LSC funds by LSC recipients).

17. See *Legal Aid Society of Hawaii v. Legal Services Corp.*, 961 F. Supp. 1402 (D. Haw. 1997).

Chart D

IMPACT OF 45 CFR 1610
(MAY 21, 1997)

The double lines in the chart are non-LSC funds. The single lines are LSC funds. A recipient of LSC funds could set up an affiliated legal services program. That program could have the same board as the recipient or overlapping boards. The affiliated entity could do restricted work if it were a separate legal entity, no LSC funds were transferred, and it was physically and financially separate from the LSC entity.

There are four factors that are used to determine whether the entity is physically or financially separate: the existence of separate personnel, separate accounting and time-keeping, the degree of separation of the physical facilities, and the presence of signs or other identifications which distinguish the recipient from the affiliated organization.

Thus, if a recipient sets up an affiliated organization that had the same board but was a separate legal entity, did not receive LSC funds, and met these factors, the affiliated entity could carry out with non-LSC funds all of the restricted activities that are otherwise prohibited for a recipient. This design is based on the *Rust v.*

*Sullivan*¹⁸ criteria, which the legal panel will discuss later. Unfortunately, we don't know how these various factors will be interpreted by LSC, and programs will have to proceed cautiously.

Under the new regulation, a recipient could transfer non-LSC funds to a totally separate program that has no affiliation with the recipient and that program could do restricted work. Before the March 1997 interim regulation, non-LSC funds that were transferred could only be used as restricted.

Finally, note that this litigation¹⁹ is really about what kind of an affiliated organization a recipient can set up. The litigation will not likely result in a decision which invalidates the restrictions.

The Implementation Panel will be talking about the difficulties of implementing these restrictions and the problems that lawyers faced in order to comply.

Since the restrictions went into effect, in April 1996, LSC has implemented fifteen new Regulations. Two Regulations that were affected by the restrictions were implemented prior to that, the time-keeping²⁰ and the competitive bidding Regulations.²¹ That's a huge number of Regulations. The only comparable time in LSC's history was at the very beginning of LSC, in 1975, when LSC issued eight Regulations in a period of a year and a half. During 1996, LSC issued fifteen Regulations over a period of four months. In addition, every program has had to develop written program policies that were to be distributed to staff to implement these new Regulations.

Finally, there was a transition period in the legislation requiring the withdrawal of recipient staff from class actions, litigation cases involving prisoners, and cases involving aliens who were no longer permitted to be represented. At the time that the restrictions went into effect, there were 630 class actions pending. Most of them were not filed in 1995 or 1996, but before. In addition, there were 428 cases involving prisoners and 2993 cases involving aliens who were in the new prohibited categories. As of now, according to program certifications, none of these cases are being handled by LSC programs. In a few class actions, any activity that is now going on fits within the "safe harbor" provision of the class action restriction, which permits non-adversarial activities. That transition period, as horrible as it was, is essentially over.

18. 500 U.S. 173 (1991).

19. See *Legal Aid Society Of Hawaii*, 961 F. Supp. at 1402.

20. See 45 C.F.R. § 1635.

21. See 45 C.F.R. § 1634.

I'd like to make another note about the conference program which indicates that you can't represent aliens or immigrants. That's actually not the case at all. As you see from the chart, there are a number of categories of alien cases that can be represented. In fact, of the immigrants that are currently in the country, including undocumented immigrants, between two-thirds and three-fourth of them can still be represented under the restrictions imposed by Congress. The point is not that the regulation is acceptable. It is not. The point is that much of the representation of immigrants can go on. As you know, that's fairly important in New York City. The Legal Aid Society, of course, started as a program to serve German immigrants, and immigration work in New York has been a significant part of the case load.

Finally, let me set a context for the Legislative Panel, by reviewing some by votes in 104th and 105th Congresses.

Chart E

CONGRESSIONAL SUPPORT FOR LSC 104TH AND 105TH CONGRESS	
Conservative: House Leadership	Eliminate LSC and Federal Funding
Senate Leadership	
Moderates: Representatives: Fox McCollum Stenholm Mollohan Senators: Domenici Jeffords Hollings	Favored Restricted LSC And Limited Federal Funds
Liberals: Senators: Kennedy Wellstone Specter Representatives: Berman Frank	Favor Generally Unrestricted LSC and Increased Federal Funding

First, the conservatives and the leadership in both the House and the Senate, except for Senator Domenici, favor the elimination of LSC and federal funding. This was the case in the 104th Congress, and continues to be so in the 105th Congress.

The liberals — and I have mentioned only a few of the leaders in the liberal camp - favor generally an unrestricted LSC and increased federal funding. But, they are a weak minority.

The balance of power is in the hands of what I have labeled as “moderate” leadership. The key players in the House are Representatives Fox, Ramstad, McCollum, Stenholm, and Mollohan; and in the Senate, Senator Domenici, Jeffords, and Hollings. All are moderates, not liberals.

The key players remain Representatives McCollum and Stenholm in the House, who favor a restricted Legal Services Corporation and limited federal funds. There are a few more Democrats in the House, than there were in the 104th Congress, but there are four fewer Democrats in the Senate. So the balance of power is roughly the same.

Now let's look at four key votes — two on legal services, two on non-legal services issues — to get a realistic perspective about the Congress.

Chart F

KEY LSC VOTES FY 1996 AND FY 1997

Domenici Amendment to FY 1996

Appropriations

Democrats For:

Republicans For:

60-39

All but Byrd (Glenn did not vote)

Bond

Chafee

Cohen

D'Amato

Domenici

Gorton

Hatfield

Jeffords

Lugar

Packwood

Santorum

Snowe

Specter

Stevens

Thompson

Fox Amendment for FY 1997

Appropriations:

Democrats For:

Republicans For:

200 out of 202

56 out of 233

First is the vote on the Domenici Amendment to the FY 96 appropriations in the Senate. This was in September of 1995. That

vote was won 60–39. All the Democrats, but Senator Byrd, voted for the Domenici Amendment.

Fifteen Republicans voted for the Domenici Amendment. I want to note a couple of developments. Senator Cohen is now Secretary of Defense; he was replaced by a moderate Republican from Maine who, presumably, would vote the same way he did. Senator Hatfield is no longer in the Senate; he was replaced by a conservative Republican from Oregon who probably would vote against legal services. Senator Packwood is also gone, but he was replaced by a liberal Democrat, Ron Wyden, who clearly would vote the same way, since Ron was an ex-legal services lawyer.

In terms of the Democrats who voted for it, there were four significant losses that were replaced by four more conservative Republicans. As a result, if we had the Domenici Amendment vote today, we would probably win 55–45.

Last year, in the summer of 1996, there was a vote on the Fox Amendment on the FY 97 appropriations. Just to give you a sense of how that went: we got most of the Democrats; we got 56 out of 233 Republicans. Of those 56, 45 have returned; the other 11 lost to democratic seats, and, virtually all of those new Democrats will vote with the Democrats. If the same vote were held today, we should be able to win that amendment.

Finally, it might be helpful to look at two other votes to give you some sense of the relative strengths of liberals in this Congress.

First is the Welfare Reform Act, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.²² This was in July 1996. The House vote was 256–170, the Senate vote 74–26, on the respective House and Senate bills. In the house 30 Democrats voted with the Republicans. In the Senate, 25 Democrats voted with the Republicans. Thus, judged by the welfare reform vote, which clearly was a very political vote, the liberals are not in a very strong position.

If you look at the Balanced Budget Amendment that occurred last week, there are similar margins. The key here is to look at the Democrats who voted for the Balanced Budget Amendment both in the House and the Senate to understand the weakness of the liberal strength in the Congress.

I have tried to set a framework for the next set of panels which will dig into these issues in more depth and present different per-

22. See 42 U.S.C. § 601 (1997).

Chart G

OTHER KEY VOTES

**PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY ACT
(July 1996)**

House:	256-170	
	Republicans Against:	4
	Democrats For:	30
Senate	74-26	
	Republicans Against:	1
	Democrats Against:	25

BALANCED BUDGET AMENDMENT (MAY 1997)

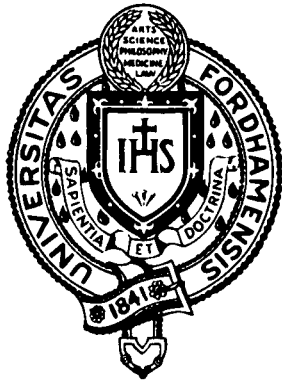
House:	333-99	
	Republicans Against:	0
	Democrats For:	108
Senate:	78-22	
	Republicans Against:	0
	Democrats For:	23

spectives and viewpoints about what this all means to legal services.

Thank you very much.

MATTHEW DILLER:

Thank you.



LEGISLATIVE ISSUES PANEL

STEVEN EPSTEIN:

Good morning, everyone. My name is Steve Epstein. I'm a student here at Fordham Law School and also the Moderator for this panel.

Before we begin this morning, what I'd like to do is tell you a little bit about the format for our panels. We are going to have each speaker deliver some opening remarks for about ten minutes, after which the next speaker will go, and so on. After all the speakers have had a chance to give some opening remarks, we will then open things up for discussion. We encourage active and lively audience participation, because that's really what this day is about.

Let me begin by introducing the Legislative Panel. We have here a great panel, and I'm really happy that they all came today.

First, Alexander Forger. As the Dean said before, Mr. Forger was honored recently here with the Louis J. Lefkowitz Award. He has spent a large portion of his legal career at the law firm of Milbank, Tweed, Hadley & McCloy, and took a couple of years off to be the President of the Legal Services Corporation. We're very happy to have him.

Next to him is Dwight Loines. Mr. Loines is the President of an organization that represents around 4,000 legal services workers and formerly was a staff attorney at The Legal Aid Society himself.

Sitting on the left of me is Dennis Saffran. I would like to say that I'm very happy to have him here today representing a different point of view, and a point of view that we'd like to have here at the conference today. Mr. Saffran is the New York Regional Director of the Center for the Community Interest. CCI is a non-partisan citizens' coalition that represents the community interests when civil liberties demands are carried to unreasonable extremes. CCI supports a progressive, but rational, policy that links compassion and common sense in the community. I'd like to thank Mr. Saffran for being here.

In the interest of time, I'm not going to re-introduce Mr. Houseman.

With that, I'd like to begin with Mr. Loines offering his comments first.

DWIGHT LOINES:

Thank you very much. I didn't realize I was going to start, but that's fine.

Let me just amplify a little bit on the introduction. I'm President of the National Organization of Legal Services Workers. We are part of the United Auto Workers. It's important that you understand that because it will give you, I think, some insight into the role that we play.

First of all, I was delighted to get the invitation to participate in this panel, particularly when I heard that both Alan and Alex were going to participate.

I'm going to take a second actually to tell a little story about Forger. I met him after he became President of the Legal Services Corporation, even though, I guess, we come from the same city. I did not actually work for The Legal Aid Society; I worked for Legal Services of New York. I understand that Alex in one of his capacities was the Chair of the Board of The Legal Aid Society. He was not my boss, so I did not get to know him in that capacity. But in Washington I got to know him and the excellent leadership that he brought to the Legal Services Corporation. But the thing that really endeared him to the Union was the fact that he spoke at our convention earlier this year. The convention was in Ottawa, about an hour outside of Chicago. We were somewhat vague on that point when we extended the invitation. The rank and file of legal services really respect you for that and your leadership. I just wanted to make that point.

And, of course, it's always good to see Alan. I see him running around D.C. quite a bit, and his role in terms of preserving legal services has been tremendous.

I just drove in this morning from Washington, where I spend, unfortunately, more time than I like to these days. So I am a little light-headed, but I think I can still string words together and make a sentence here.

In the last several weeks, as a representative of a labor organization, I've had the occasion to meet with quite a few people on the Hill. It wouldn't surprise you to know that we have excellent relationships with just about every major Democrat on the Hill, and that has benefited legal services tremendously over the years. But it may surprise you to know that we also sit down and talk to people who we have actually tried to defeat. We've had meetings in the last several weeks trying to explore the possibility of addressing both the funding problem and the problem of restrictions.

I think Alan was very accurate in terms of where Congress is these days, and we don't have any illusions of being able to turn things around immediately. But it was important to start some discussions with people in the Republican Party — frankly, some people fairly senior in the Party — who will acknowledge privately that these restrictions are horrendous. Of course, they will then blame it on their right wing and the fact that the House is so volatile.

We have to get back to the point where there are no restrictions on non-LSC funds from other public sources and on private funds. We clearly have to get back to that point, and we have to reduce the number of restrictions as best we can on LSC funds. So that has to be our long-term goal.

We also have been talking about trying to push up the level of funding, even though we hear very ominous sounds coming from the House side, in terms of what they may be thinking about doing.

In addition to all the things that Alan pointed out in terms of the restrictions, the impact of the restrictions in different parts of the country causes us a great deal of concern. In places like in the Southeast, where they don't have the luxury of having non-LSC resources available, in those states these restrictions are absolute and there is no way around them. They are in place and they define reality.

In a number of places, like New York, Boston, and Philadelphia, where there are significant non-LSC funds, they have essentially developed dual programs, separate programs. That's how they have attempted to accommodate themselves to the situation. But it has created sort of a system of two classes of programs. Programs that are not restricted, are viewed as the elite. The other programs are often considered second-class. There is strain and there is a great deal of discomfort in that situation. The restrictions placed on legal services programs are extensive. The view that the employees have of themselves and their programs has been diminished.

The restrictions also have led to, unfortunately, frictions within the legal services community. I think everybody has tried desperately to keep those frictions from becoming any more pronounced than they are. But there are frictions that have developed. There is, frankly, name-calling and blaming. The lawsuits that were brought challenging the restrictions — and the people who brought those lawsuits — are distrustful of the people they see as being

responsible for the day-to-day political activities in Washington. So there is a great deal of suspicion there that is causing problems.

Whether or not LSC, in adopting its revised Regulations with respect to interrelated organizations, whether that was the wisest thing to do under the circumstances remains a question. I mean, there is a lot of debate on that. We were hoping, at least up until a few days ago, that Congress, including members of the Republican Party in the House, would simply allow the lawsuits to run their course and essentially accept LSC's explanation for why they revised the restrictions. It's not absolutely clear that strategy is going to work out, and that may complicate our legislative efforts in Washington. So things are not entirely rosy and there are problems that have developed that we are going to have to stay on top of.

Just so people can have some sense of the political context that existed when these restrictions came into being, right after the new 104th Congress came in, the Gingrich Congress came in. I was in Washington. We first went around to talk to the Democratic leadership, people with whom we had worked for years. They were completely and totally demoralized. You have to understand that. Their only answer to any issue we raised was, "Let's let the Republicans hang themselves. They're going to destroy programs that are going to affect people and ultimately they're going to pay the price." Their honest assessment was that the program was as good as dead.

The reason I wanted to take a few seconds to talk about that is because what happened, in terms of the restrictions, represented the outcome of a debate that was essentially within the Republican Party. The Democrats and moderate Republicans were not really involved in that debate. The debate was essentially between McCollum, who wanted to "reform" the program, and people like Gekas, who wanted to block grant and phase out the program. That's where the debate was. The Democrats were out of it, except for the "blue dog" Democrats, who, through Stenholm, were participating in this process.

So that's how these restrictions came about. There was next to no chance to affect things. We sat down with McCollum, even though we had beaten him throughout the 1980s. His agenda was very clear: his agenda was the imposition of these restrictions, and he didn't deviate one iota from that. So that's where the restrictions came from. We had next to no ability to stop that from happening.

The one thing that I think everybody decided to do, however, was to support continued funding for the program and hope to be able to be in a position to fight the good fight another day. That's sort of my take on where things were historically and where things are now.

I'm not terribly optimistic about where things are going to go in the short run. Part of it has to do with the lack of real coordination and working together of the various organizations that have been a part of the struggle over the years.

To be totally honest, a few bar leaders will not turn the situation around. It's going to take more passion, more commitment; it's going to take broader coalitions; it's going to take a lot more noise — a much more developed, coordinated strategy — in order to turn the situation around. The people who are voting in Congress don't, for the most part, care about the merits. If they did, when the Christian Coalition says the legal services should be ended because it promotes dissolution of the family — they would be dismissed as lunatics — if you don't immediately dismiss these groups when that argument is raised, then I don't know what kind of thinking is going on here. So it's not a matter of convincing people on the merits. It's a matter of, for the most part, bringing to bear pressure on people so that they are so uncomfortable, so that their standing, their ability to get re-elected, is challenged.

I'll give you one example. There is a Congressperson from New York State — and I will not mention his name — who came in as a Gingrich clone several years ago. We met with him and went over every issue, explaining in great detail why he should not be supporting the opponents of the program. He listened and voted consistently against us. This year he has done a complete about face.

He has totally reversed himself. His position now is he will support labor initiatives and he will support legal services initiatives. What turned him around? Again, it was not the merits. What turned him around was the work that was done in his district to make it clear to him that there was a great risk to his future in Congress if he didn't reverse himself. Of course, it helped that one of his colleagues was defeated, primarily by organized labor, because of his embrace of right wing issues.

That's what it's going to take. I don't see, to be totally honest with you, the leadership coming from the traditional organizations that have been involved in this struggle. I don't see the coordination that should be going on. This year, for the first time in many years, the Union is basically, essentially, working alone. We're

talking to people in the White House, we're talking to people, as I said, on the Hill, and we're talking to senior people on both parties. We are also attempting to build a broad coalition in support of the program.

The White House gives lip service to legal services. They are not going to be prepared to go all out unless they are getting pressure. A few nice letters to people in the White House is not going to do it. Our strategy is to make them feel uncomfortable on this issue so they do the right thing. That's going to take a broad-based, well-coordinated effort. I do not see it happening at this point, but again, I'm happy to be able, as a representative of labor, to bring to bear — the UAW, their political action funds, their community action programs, and the rank-and-file members, people who work in legal services — I'm pleased to be able to bring them to bear in this struggle.

STEVEN EPSTEIN:

Thank you, Mr. Loines. I'd like Mr. Saffran to go next.

DENNIS J. SAFFRAN:

Thanks very much, Steve. Since I'm kind of the "black sheep" on the panel, let me begin by telling you a bit about who I am and where I'm coming from.

The Center for the Community Interest is a public interest group that, as Steven said in his introduction, attempts to represent what we call the progressive, but rational, center.

By way of background, most of us in CCI actually come out of a background in the progressive or public interest movements or the liberal wing of the Democratic Party. We retain a commitment to active and compassionate government and to helping the poor. But, all too often, we have seen decent and human liberal policies carried to unintended extremes that hurt the very people they're intended to help.

We formed CCI to try to provide a common-sense counter to these extremes, without going to the other extreme, and to try to speak up for the real day-to-day interests of poor people who are too frequently ignored by the Right but disserved by their purported champions on the Left.

There is an implicit assumption — and I understand a lot of people came here for a workshop basically on what to do about these terrible restrictions, and I respect that — but I do want to challenge the implicit assumption that the policies of Legal Services and the

interests of the poor automatically coincide, so that anything that restricts Legal Services is necessarily bad for the poor. Rather, I'd like to suggest that in several important areas the ideology of Legal Services is actually at odds with the day-to-day interests of the great majority of poor people, and that the restrictions passed last year represent a flawed, but necessary, effort to get Legal Services back to its original mission of helping poor people with their legal needs.

My position on Legal Services is mend it, don't end it. I guess I fit in with what Mr. Houseman described as the moderates. Given that I do, I think that I can give you an important perspective on where those moderates and swing votes are coming from.

I said that it was a flawed but necessary step. It's actually flawed, I believe, in two contradictory ways. In some respects, I would actually agree with the other members of the panel and with, I assume, most of the audience, that some of the restrictions, such as the class action restriction,¹ go too far — it's a blunderbuss approach. In other respects, however, the restrictions are actually strewn with loopholes and really do not go far enough to respond to genuine abuses. This is particularly true of the drug-dealing restriction,² which I'll talk about at more length. So I think that the restrictions were not properly tailored.

Let me talk about the drug dealer aspect of this, which my group is most familiar with. Legal Services has consistently represented drug dealers in eviction cases in public housing and other low-income housing throughout the country. The case that we were involved in was a class action suit — and, by the way, even though as I said I think the class action restriction goes too far, as I describe this case I think it might give you some hint of why Congress just threw up its hands and said “no class actions whatsoever.”

The case we got involved in was the *Escalera*³ case, which some of you may be familiar with, where my organization was allied with the Dinkins Administration and the elected public housing tenant leadership throughout the City in opposition to the Legal Services Corporation and The Legal Aid Society, which were opposing the modification of a twenty-five-year-old consent decree that Legal Services and Legal Aid had obtained against the Housing Authority in 1971.⁴

1. See 45 C.F.R. § 1617 (1998).

2. See 45 C.F.R. § 1633.

3. *Escalera v. New York Housing Auth.*, 924 F. Supp. 1323 (1996).

4. See *id.*

This is a case dating from 1967, during the "rights revolution," when groups like Legal Services were quite properly leading the way in responding to the kinds of abuses we'd had before then, abuses in which tenants and other poor people were denied basic rights and dealt with in an arbitrary, and sometimes racially insensitive, fashion.

In *Escalera*, Legal Aid and Legal Services, on behalf of a designated class of all public housing tenants, obtained a detailed eviction process, where essentially you have to go through a labyrinthine procedure to evict anyone from public housing in New York City.⁵ It's a two-step procedure that sometimes can take up to two years.

What *Escalera* did was set up a required internal administrative proceeding with multiple layers of review. Then, even after that first step runs its course (and that can take well over a year) the Housing Authority still has to go into Housing Court, like any other landlord, and deal with all the problems there of getting to the final step of an eviction.

As bad as the drug and crime problem was then with heroin, since this went into effect in 1971, we have had the crack/cocaine epidemic, we have had massive escalation of drug-related crime, particularly in low-income areas, and particularly in public housing projects, throughout the country.

While this crack/cocaine epidemic was going on, anti-drug activists in low-income communities in New York discovered on the books something called the "Bawdy House Law,"⁶ an 1870s-era statute that was originally designed for just what it sounds like: to close down speakeasies and so-called houses of ill repute. But it turned out to be a wonderful tool in the effort to rid poor and low-income neighborhoods of the scourge of drugs.

What it allows for is an expedited eviction proceeding — still with a due process hearing, but with a calendar preference — against tenants who are engaged in illegal operations on a premises. A "Bawdy House" action can be brought by either landlords or by other tenants: If the landlord won't act or just wants to sit there and let a drug dealer pay his rent on an apartment, poor people themselves who are neighbors can go into court to get the drug dealer out.⁷ It generally takes about forty days.

5. See *id.*

6. N.Y. REAL PROP. ACTS. LAW § 711(5) (McKinney 1997).

7. See *id.* § 721.

When the community anti-drug activists brought this to the attention of some of the DAs — specifically, Bob Morgenthau in Manhattan and, at that time, Liz Holtzman in Brooklyn — they started setting up special “Bawdy House shops” within the District Attorneys’ Office to bring some of these cases. It started to be used throughout the state, and was very effectively used in both public housing and other low-income housing projects upstate and in suburban areas, and in all non-public low-income housing, such as subsidized housing in New York City.

It has been an extraordinarily important tool in doing something about the drug problem in low-income housing. The one housing provider that could not take advantage of it, though, as a practical matter, was the largest provider of low-income housing in the country, the New York City Housing Authority. It couldn’t be because the “Bawdy House Law” expedites step two of this lengthy two-step program down to forty days from four-to-six months, but you’ve still got step one, which is a year-and-a-half. So essentially the “Bawdy House Law” was useless.

The Dinkins Administration, under Sally Hernandez Pinero, moved to re-open the 1971 consent decree to modify it to allow the Housing Authority itself to bring “Bawdy House” cases directly in court without going through the preliminary administrative process in situations of drug dealing. That was instantly opposed by the *de jure* class representatives, the Legal Aid Society and the Legal Services Corporation.⁸ They came in to court to oppose this with a knee-jerk response in opposition, without making any attempt to ascertain the wishes of their clients who were of course supposed to be *all* of the residents of New York City public housing. They said in their court papers that “the instance of drug-related crime has not increased in New York City public housing since 1971.”

What we did was to organize the elected tenant leadership who, in fact, unanimously supported the City’s effort to modify the decree. Every New York City public housing project elects a tenant association president, and then the presidents, in turn, elect eight district leaders throughout. We had every one of those elected tenant leaders sign on to our motion to intervene in the case on their behalf, and say to the court, “While the *de jure* class representatives from 1967 are opposed to the City’s motion, in fact our constituents — the real tenants, overwhelmingly support what the Dinkins Administration is trying to do.” The City won that case. I

8. See *Escalera v. New York Housing Auth.*, 924 F. Supp. 1323 (1996).

think a big part of the reason why is that the presence of the elected tenant leadership in the case forced the court to reexamine the assumption that lawyers make that the Legal Services position is necessarily in the interests of the poor.

I made a lot more notes because you assume that ten minutes is going to go on forever, but I think this gives you a flavor of where we're coming from and, I hope, will cause people to see that there are definitely two sides to this issue. As I said, my position on legal services is mend it, don't end it. I think I'm certainly representative, as Mr. Houseman said, of the moderate swing votes in Congress. I think I'm representative of where the great majority of the public, including the great majority of poor people, are on some of these restrictions.

What I would like to leave with you is that you're going to drive away those moderates, and you're going to lose all funding, if Legal Services continues to maneuver to get around these restrictions in every way: if it continues to set up the dual mirror organizations and to bring lawsuits to strike down any limitations that Congress imposes; if it continues to thumb its nose at the political center and to flout the spirit of the restrictions by bringing cases against many moderate Clinton Administration initiatives, such as bringing a lawsuit, as they did in one area, to oppose a school uniform requirement. Now I have no strong feelings one way or the other on school uniforms. But what in heaven's name, given the limited resources of Legal Services, does attacking a school uniform requirement have to do with serving the interests of poor people?

ALEXANDER D. FORGER:

I'll tell you in a minute.

DENNIS J. SAFFRAN:

Tell me now. Doesn't it reflect a '60s lifestyle ideology that has a lot to do with the personal philosophies of Legal Services lawyers but little or nothing to do one way or another with serving the day-to-day needs of poor people?

Mr. Forger says that this case was brought because of the cost and embarrassment to young people who couldn't afford the uniforms.⁹ Of course that's mind-bogglingly out-of-touch. What does he think they would wear *instead* of the uniforms? Does he think they would go naked? Doesn't he know that the reason that

9. See *infra* p. 317.

almost every Afrocentric academy has imposed a uniform requirement, and the reason the idea has spread like wildfire among parents' associations in the inner city, is because of the "cost and embarrassment," and the crime and violence, resulting from the peer pressure on kids to spend their mothers' entire paycheck or welfare allotment on a pair of Air Jordans or a designer jacket? It certainly seems as if Legal Services is more interested in promoting the lifestyle of its lawyers rather than the needs of its clients when it brings a case whose primary economic beneficiaries are Tommy Hilfiger and the Nike Shoe Company.

The other key point here is limited resources. A lot of people say on the drug cases, "Well, don't they deserve a right to representation? Doesn't everybody have a right to representation, even in a civil case?" But we hear at the same time that Legal Services does not have enough staff attorneys to go around to serve all the needs of the poor. Given that, don't priorities have to be set? And if you're going to set priorities, if you set that priority that you are representing a drug dealer, who are you not representing? There's no free lunch here.

In fact, there is evidence in a survey that the Legal Services Corporation did in the early 1990s that the priorities of many Legal Services grantees and lawyers may be totally out of whack and may actually favor the drug dealer over the ordinary tenant. They found that public housing authorities had a much easier time against some of the same drug-dealing tenants, who the local Legal Services chapter had defended to the hilt, if they instead brought a non-drug-related eviction. If they found the same guy is not paying his rent, we'll go after him for non-payment of rent, or we'll go after him for some other lease violation. Somehow, those cases were far less frequently taken up by Legal Services than were the drug dealer cases. That represents a very skewed sense of priorities.

Decisions have to be made. I think, to give a hypothetical, if you had a tenant in public housing who was shouting vile racist epithets at African-American and Latino neighbors, and was thus in violation of his lease by violating those people's right to quiet enjoyment, that person would "deserve" representation in an eviction hearing also. I don't think Legal Services would choose to represent that person. Because of their limited resources, they would say, "Let's devote these limited resources to poor people who are not harming other poor people."

In fact, of course, those who deal drugs out of their apartments and bring about all the associated gang violence and crime, and who create a situation where poor people are literally putting their children to bed in bathtubs to protect them from the drug dealers' bullets, of course, those people are doing far more harm to the day-to-day lives of average poor people and minority people than is the vile racist in my hypothetical.

I think Legal Services has to make those choices about priorities. I think if they don't, they are going to bring about a reaction on the part of the moderates in Congress that's going to wind up with a total cutoff.

Thanks.

STEVEN EPSTEIN:

Thank you, Mr. Saffran.

I see that the coffee has kicked in and we have the makings of a lively debate. With that, let me turn it over to Mr. Forger.

ALEXANDER D. FORGER:

My experience with legal services was basically with The Legal Aid Society of New York, the oldest and largest provider of service. From that vantage point, particularly during the 1970s, I was exposed to the Legal Services Corporation and its directives and its auditing and monitoring, and found it to be quite oppressive. But then you realize that in the 1980s the people who populated it were really folks who didn't care for the organization. It was founded in the 1970s as an outgrowth, as you all know I'm sure, of the War on Poverty and OEO,¹⁰ and it became a corporation in one of the last acts of the Nixon Administration, in 1974 for the slated purpose of removing the program from the political arena.

Among the congressional statements of purpose was that the poor, or those who couldn't afford lawyers, should have the same access to justice as those who have the financial means to do so, and, moreover, that the lawyers representing those people should have available to them the same privileges, rights, procedures, methods of procedure that those who were paying for lawyers could have.¹¹ So its initial conception was that it was nonpartisan and it was devoted to the cause of making justice available to all, irrespective of financial resources.

10. OEO is an acronym for The Office of Economic Opportunity.

11. See 42 U.S.C. § 2996 (1994).

As I have spent some time in Washington, seeing the inscriptions on buildings and listening to speeches and public declarations, the one phrase that really stays with me is in the Preamble to the Constitution, which states “We, the People of the United States, in Order to form a more perfect Union, establish Justice, ensure domestic Tranquility, provide for the common defense”¹² and so on. I think those words were chosen with great care and purpose, particularly in the sequencing of the objectives to be achieved. The Founding Fathers had lived through tyranny without benefit of the rule of law and recognized that the firmest foundation of good government is justice and without it, domestic tranquility becomes somewhat irrelevant. As they say in the current jargon, “no justice, no peace.” So that was the cornerstone of the Legal Services Corporation.

Another fact you should know is that when people ask, “Why does the Legal Services Corporation initiate certain types of cases?” the answer is that Legal Services Corporation, of course, does not. It functions essentially as a block grant program. It is funded by Congress and it oversees its grantees to ensure quality and effective service, as well as compliance with the law and regulations. The grantees are separate, independent corporations. Each has its separate, locally organized board, hires its local attorneys, and sets its own community priorities. So it isn’t bureaucrats or ideologues in Washington who are telling the field the kinds of cases that they should bring.

I went to Washington after forty years of practice holding the belief that logic, reason, and analysis were relevant. Not true. These lawyering tools have little to do with the legislative process. In my lighter moments I referred to my three-plus-years sojourn there as “Alex in Wonderland.” You cannot fully understand the process of government until you represent people who don’t much matter, who have no clout, no PACs and no influence over the reelection of a member of Congress. Without that, you don’t count — except with those who place principle above politics. Most members I have met seem more concerned with reelection than anything else.

As to the legislative process itself, the first hearing I attended was a rude awakening. The Chair, Mr. Gekas, said, “Mr. Forger, do you think it is appropriate to spend federal taxpayers’ money so gays and lesbians can march in the St. Patrick’s Day Parade?” I

12. U.S. CONST. preamble.

said, "I'm sorry, I'm not familiar with that case and I can't comment." Well, of course, that, like virtually every other case I heard put to me in three years before Congress, had nothing to do with the Legal Services Corporation or its grantees. But that doesn't matter.

I have heard repeatedly that LSC persists on representing drug dealers throughout America. But this is pure mythology, being repeated here in a sense today. It may well be that somewhere, sometime, a drug dealer was represented by a federal program, but that's not the stock in trade of the Legal Services Corporation.

And fueling the unwarranted criticism of LSC is the Christian Coalition. They don't like us because we do divorces for poor women. Why? They say it makes them dependent on welfare and we're trying to free these women from dependence. Apparently it is preferable that they should be battered and abused. Last year LSC programs handled 59,000 cases of spousal abuse, 200,000 divorces, most of them based in domestic violence and abandonment.¹³ And yet it makes no sense, to say, as these critics do, "terminate the legal services program because it's anti-family."

But even were it inappropriate to represent any woman in a divorce, why advocate killing off the entire program. Or, if more needs to be done on drug dealers — and we think the restriction is pretty tight — let's tighten it further. Don't advocate ending an entire program.

Of the 1.6 million cases handled last year, ninety-eight percent were routine, everyday problems such as helping families stay together — not on the street — keeping their jobs, enforcing child support payments, and obtaining access to health care.¹⁴

Yet we have been portrayed as representing rapists, prisoners who seek to prevent prisons from segregating those with AIDS, and those who seek sex change operations. After a while, these stories take on their own lives. And sooner or later letters circulate within the Congress, such as: "Dear Colleagues: Did you realize the Legal Services Corporation represented people seeking sex change operations? Isn't that outrageous?" Yes, it is outrageous — the misrepresentation, that is. As I've said many times in testimony, if I believed one-quarter of what I've heard anecdotally, I'd be the first to seek to destroy this program.

13. See generally Mike Austin, *LSC Chief Predicts Funding Cuts Are Over*, CHI. DAILY L. BULL., June 12, 1996.

14. Mary Wisniewski Holden, *Clipped Wings and Budget Cuts Tax Legal Aid*, CHI. LAWYER, Aug. 1997, P1.

And then there is the Farm Bureau. What does the Farm Bureau have against us? We represent migrant workers. What's wrong with representing migrant workers? Well, they make trouble. They want decent housing, a minimum wage, or freedom from pesticides. The workers are among the most vulnerable in our population and, of course, the least influential.

In the legislative process, I can assure you that I have been told by one legislator, "I can't support you openly. This is an election year. I receive support from the growers, so don't expect me to stand up and say I support legal services." I've seen another legislator who was contacted by a major contributor walk off the floor rather than cast a vote that wasn't wanted. That's the way the system works. It seems to run on influence, fueled by money. Election finance reform is sorely needed but even that may not put us all on a level playing field.

But since all politics is local, our best chance for gaining support for legal services must be in the local community. Those who seek reelection respond to the voters who matter to them in their districts.

I agree with Dwight, one needs to go beyond the bar. The bar isn't enough.

I need now refer to the case involving school uniforms.¹⁵ As I recall, the uniform case involved an issue of cost and embarrassment to young people who could not afford the uniforms.¹⁶ It was a matter of dignity and self-worth, not unimportant among the disadvantaged.

Just like the current Texas election case,¹⁷ where sixty-some-odd Senators said, "LSC is trying to deprive the men defending our borders from voting absentee." The reality was far different from that. It was a case well brought, as is the circumstance with most that have been brought.

But we can always find a disagreement with some cases, just as we can find disagreements with what is done in any institution. But the answer isn't to destroy the institution — otherwise, we'd have no Congress, we'd have no church, we'd have no other institution — if we all had to agree with every position that they take.

I'd be happy to engage in dialogue later.

15. *See supra*, pp. 47-49 (criticizing LSC's use of its limited resources on a school uniform case).

16. *See id.*

17. *Casarez v. ValVerde County*, 957 F. Supp. 847 (W.D.Tex. 1997).

STEVEN EPSTEIN:

Thank you, Mr. Forger.
Mr. Houseman?

ALAN W. HOUSEMAN:

Just a couple of quick points, including an update. There are two people in this room that can get into the dialogue on drug cases far better than I and I defer to them.

Nationally, we could only find about ten or twelve cases that allegedly involved drug dealers when we last tried to get a firm figure on representation of drug dealers. These ten or twenty cases were out of probably 50,000 public housing eviction cases in which legal services was involved. So I don't really think representation of drug dealers is a problem. This restriction of drug dealers legislation by anecdote, which is the way we seem to function in the Congress.

The update is this. We are now hearing that the House leadership and Congressman Rogers, the Chair of the Subcommittee in the House that oversees LSC appropriations, have agreed to block grant the program along the lines of the "Gekas" bill, which is a block grant proposed by the House Judiciary Committee in 1995. We don't know if this is true, if it is a tactical move, or if it is a rumor that will never become true. Whatever it is, I think it emphasizes the fundamental point that Dwight made, which is that this year again we face a struggle over the very survival of legal services as an institution and as an effective program. Hopefully, there will be some openings during the legislative process to reduce some of the impact of the restrictions and increase funding. But it may well be that this year we're back to the same kind of struggle we had in the last two years: the openings will be few and far between and the ability to get at least significant increased funds or some positive change in the restrictions is going to be very diminished.

Now, the other two points that I want to make. There has been a fairly substantial, significant effort around the survival of legal services. I don't think it's coordinated as well as it should, but some people are unaware of the national efforts.

- First, there has been substantial direct lobbying on the Hill both by the Legal Services Corporation and by the advocates who work on this at NLADA,¹⁸ CLASP,¹⁹ the ABA²⁰ and others.

18. NALDA is an acronym for National Legal Aid and Defenders Association.

- Second, within the legal service community there are two very substantial networks that have coordinators in each state and in each district. One is a network run by the American Bar Association and the second is a network run by NLADA. The NLADA network does not involve LSC-funded advocates, because of the new restrictions. These are two separate networks. They have been very effective in building grass-roots support at the local level, along with the efforts of the Union and other allies at the local level. I agree completely with Alex that this fight is, and can only be, won at the local level.

- Finally, there has been consistent and continuing pressure from the White House. There is support in the White House, but, as with everything, the priorities of the President don't necessarily include our priorities all the time and in every situation. For example, the Legal Services Corporation was not protected by the Balanced Budget Amendment that was adopted by the Congress last week.²¹ It was expressly not protected. There is a set of letters going back and forth between Speaker Gingrich and the White House that expressly took LSC out of any potential protection by the Balanced Budget Amendment. Decisions on LSC will be left up to the appropriation process, as it has been historically. As I said earlier, the leadership, including Speaker Gingrich, has recently indicated that their new strategy is to adopt a block grant approach.

That does not mean that the White House will not support legal services. I think it will. It does mean that pressure has to be continued on the White House. It is not a priority of this President, in the sense of an overarching priority, but it remains true that the First Lady and key members of the Administration, including the Counsel to the President, the lobbyist arm of the White House, OMB,²² and the President himself, are very supportive. Frank Raines, the head of OMB, used to be on my Board; he knows legal services backwards and forwards, and I know he will come through for us.

So I think there is White House support. The White House efforts in April of 1996, again, have gone unstated, but were very substantial in preserving the Cohen-Bumpers Amendment, the

19. CLASP is an acronym for Center for Law and Social Policy.

20. ABA is an acronym for American Bar Association.

21. Pub. L. 105-33, 111 Stat. 251 (1997).

22. OMB is an acronym for Office of Management and Budget.

separately funded migrant programs, and other key components of the LSC funded system.

I think I'll stop there.

STEVEN EPSTEIN:

All right. Thank you.

IMPLEMENTATION ISSUES PANEL

STACI ROSCHE:

We have a very distinguished panel with us here today. To my far right is Shirley Traylor.¹ She is the Executive Director of Harlem Legal Services. She had been the General Counsel of the New York City Department of Homeless Services and Director of Litigation of the Community Service Society of New York.

Immediately to my right is Jill Boskey. She worked for ten years for MFY Legal Services. She is now the Co-Executive Director of CeDAR, the Center for Disability Advocacy Rights, which she co-founded with Christopher Bowes in reaction to the LSC fund restrictions.

To my left I have Valerie Bogart. She is a Senior Staff Attorney for Legal Services for the Elderly. She previously spent six years with The Legal Aid Society Office for the Aging, and perhaps is most visible in the public interest community for her involvement as the lead attorney in the *Varshavsky* case.

Finally, to my far left, is Lucy Billings, who is Director of Special Litigation at Bronx Legal Services.² She began with Legal Services in 1973. I think she is widely recognized by many for her involvement with the lead paint litigation, but she has also been involved with class actions involving housing, environmental justice, health, child welfare, and public Benefits.

Just as a point of background, each person is going to take about ten minutes to describe how they have been directly affected in implementing the restrictions that have been handed down and how they have made their lives a little bit harder.

JILL ANN BOSKEY:

I cannot let pass that I am sitting to Staci's moderate right. I'm use to being at the extreme left. I think I can survive for one day sitting a little bit to the right.

I worked at MFY for ten years doing primarily SSI work. MFY Legal Service is an LSC-funded corporation. One of the interesting things about the work that I did is that I was at no point funded in any part — not even my little finger — by LSC funds. We were funded by state and city funds, the DAP (Disability Advocacy Project) contract, and by attorneys' fees. Who knows whether any

1. At the request of the speaker, her remarks have not been included below.

2. Lucy Billings is now a New York State Court judge.

IOLA³ funds went to us, but I think not. We were funded completely by funds that were not restricted.

When it became clear that either the restrictions were going to come down or the federal funding cuts were going to come down in such a heavy way that it would seriously affect the work that I was doing — or both, which is what in the end happened — I started trying to figure out how to live with this situation.

The work that I did, and that Chris, who's working with me, did, at Legal Services, that David did before me — David Udell had my job before me — was a combination of direct services, administrative advocacy, class actions, that fit well together and that functioned well together. By seeing the individual clients, dealing with their individual problems, you realized what was a problem that needed to be addressed either with an individual impact case or with a class action.

Getting attorneys' fees on cases maybe made the agency rethink what it was doing. Sometimes I have my doubts. I like to believe it does. At least it provided funding to allow us to continue to do the work that needed to be done.

In the area of benefits, class actions have been a very important and useful tool that legal services was able to use. So I started looking around for a place to go, a way to continue doing what I felt needed to be done. Both the funding cutbacks, which at MFY resulted in increasingly smaller numbers of offices in increasingly fewer neighborhoods (and not only for MFY; it seems like everybody in the city is moving) and the inability to do restricted work made it clear to me that I couldn't continue to do what I felt needed to be done and what I wanted to do.

I was lucky to have the availability of some funds to go out and start the Center for Disability Advocacy Rights to do exactly, pretty much, the work that we did at MFY. For me, the restrictions have been a nightmare. But they have also had a wonderful result because I love CeDAR, I love doing the work, doing the work that we wanted to do — assuming that we survive, and I have faith that we'll survive, that the funds will drop from the sky and keep us going.

We don't like being in a position of competing with legal services offices for funds because the work that legal services offices do is important, and it's unfortunate that we're in that position.

3. IOLA is an acronym for Interest on Lawyer Accounts.

During the transition between my leaving MFY and my going to CeDAR, I was doing what people, I think, are trying to do to live within the restrictions, either by going part-time or by doing work, figuring out whether I can do this work or not. It became crystal clear — and this is the main thing that I want to talk about — that it's impossible. It's impossible to do it humanly and it's impossible to do it ethically. The chilling effect is horrendous.

If somebody came to me and said, "I went to an appointment for welfare and they told me I had to work, and they didn't give me a notice. They told me I had to work in words, but they never sent me a notice, and now they've closed my case." And then, the next day, somebody else comes and says the same thing. As a restricted legal services attorney I could bring a fair hearing for each of them, go to the fair hearing for each of them, et cetera. As a human being, as an attorney, I think, "Gee, this is happening a lot. It ought to be addressed in a massive way." And then, sitting in my office at MFY, when I was working part-time at MFY, I would think, "Oh, I'm not allowed to think that thought here. Let me go out in the backyard and think that thought. Okay, I've decided I'm not going to bring this as a class action, so I can go back inside and think about it. Oh, but maybe I should call somebody high up in welfare and see if I can solve this problem. Better go back out in the backyard and think about it."

I don't know how people who are still in LSC-funded programs deal with this nightmare. Maybe if you think about it, nobody knows what you're thinking about. But suppose somebody calls you up on the phone and says something, and you're not allowed to use an LSC-funded phone to talk about administrative advocacy. Do you say, "Excuse me, I have to go out to the corner public phone and call you," and put in nickels every five minutes?

In terms of the lawsuit, the challenges to the restrictions, I am a plaintiff. I think it was essential. This is one reason that I said I'm usually on the far left. I worry about the places like Nebraska, that don't have enough money, enough attorneys, to have an LSC-funded program and a non-LSC-funded program. Even in New York City, where we're probably in the best shape of anybody in the country, there aren't enough attorneys to represent people both restricted and unrestricted. In the places out there in the middle of the country where there aren't even two organizations, I worry about what happens.

Part of me worries — this was talked about some in the earlier panel — is the challenge going to make legal services go away?

But the part of me that's way out there says, "If it does, then maybe it shouldn't be there. If we in legal services are so limited in what we can do that when a client comes in we have to say, 'I can't represent you on this kind of matter. Even on the matters that I can represent you, the tools that are available for other people are not available for you if you come to me. And I know that you can't go anywhere else because there's nobody out there that you can pay.'"

Should we let Congress, should we let the President think that he's actually supporting legal services for the poor when legal services for the poor is legal services for the poor with one hand tied behind your back? On my good days I think, "Let it come to a crisis. Maybe there will be a revolution."

What I hope to see happen is that the restrictions will be lifted. I started to read through the latest regulation that came out, which I hadn't read before, and it still does the same thing. You can have separate organizations and, if we decide after the fact that they're separate enough, everything's going to be okay. But we're not going to tell you really exactly how separate you have to be to be okay. And there you have the chilling effect again. You can't know in advance whether you're going to be in violation. Even stuff like you can't share a Xerox, you can't share a fax, you can't share a receptionist. Which, I think, is still in the latest version of the related organizations restriction, is ridiculous, unless maybe these related organization restrictions are set up to support IBM, META, the people who make the faxes and make the Xerox machines and the phone systems, so that everybody will have to buy two if they want to do both kinds of work.

The way legal services has worked, and the way it has worked well, and the thing that I love about it, is the interaction of direct service and impact litigation and legislative and administrative advocacy growing out of that. The effect of these restrictions is to absolutely do what Congress says they don't want us to do: to have people over here who don't see clients deciding what we should do in administrative advocacy and class actions, and the people over here who do see clients not allowed to bring those actions.

Now, of course, we do talk. We have to be careful what we say over which phones, but I think that even restricted people are allowed to talk to non-restricted people about the issues that they're seeing. The process is crazy. I think I'm talking to the converted. The process is crazy, and particularly crazy in my area of law, public benefits, SSI, in the context of welfare reform. Welfare reform

is the thing that has come down and the thing that needs prompt and massive response. To try to fight welfare reform in individual cases where you can't raise constitutional issues is crazy. It's another reason why I had to get out.

There is one more thing I want to say about being in legal services. Although my work was benefits work, being part of that bigger community is incredibly important. I don't do housing, but the stuff that I learned from the housing attorneys in my office when I was at MFY is really important, the interaction of people. What they're trying to do is separate us out so that we can't interact. It hurts us, it hurts our clients, it hurts the community we try to serve.

I have a lot of respect for those of you who have managed to survive and are continuing to survive and struggle inside the restrictions. I couldn't do it.

VALERIE J. BOGART:

I am an attorney with Legal Services for the Elderly in New York City. I specialize in elder law. It has been very hard to do my job. As a specialist in elder law, I agree with a lot of what Jill said. The problems I deal with are, again, the state, the city government, the federal government. When I read through the list of activities that is in one of the handouts that we're still allowed to do, a lot of them are very important. I still go to fair hearings, I still bring court cases, but the last time I called up a government policy person and asked them to please change their policy — because I'm allowed to do that — I can't remember when I did that. Maybe I had a fantasy dream about doing it. But, as we all know, it doesn't work. These are not well-meaning bureaucrats who just make mistakes and are waiting for a legal services lawyer to call them up and say, "Whoops! I think that regulation has an 'and' and I think you really meant an 'or,'" and they change it, thanking you for pointing that out. We know that's not what's going on, especially with the Welfare Reform Act.⁴

I deal with issues that have nothing to do with the Welfare Reform Act, but I feel that it is a war. In the last two years, the issues I deal with, getting long-term care for elderly and disabled people, have simply become more and more of a war. The state and local governments are only looking to cut back funding, and they will use any tactic they can. We have to use any tactic we can to represent our clients.

4. See 42 U.S.C §§ 601-618 (1996).

Class actions are, of course, an absolutely essential part of that tactic. I have personally been fortunate, partly because of my own actions, in bringing the motion in *Varshavsky*,⁵ that for this transition period, the first year of the restrictions, I have been able to continue doing my work. Although, for what is now approaching a year, I have been feeling the effect of the restrictions more and more in my work.

I am class counsel in the *Varshavsky* case.⁶ There will be people in the courtroom who will disagree why I continue to be allowed to be class counsel. One reason is that a court decided that the restrictions were unconstitutional when I made a motion to withdraw as counsel and requested that the court find that the law was unconstitutional. My employer, LSNY, and LSC, say that's not the reason I'm still allowed to be counsel. The only reason I'm allowed to be counsel is that it happens that the case is currently in a non-adversarial posture. We don't have any motions pending.

So even though I have quite a compelling court order, which is available for you to read, I live in dread of the day that this class action turns adversarial, as it nearly has a few times in the last few months, but we've been able to hold it at bay. When it does, we'll be back with a big turmoil with LSNY, and with LSC probably, about whether I'm allowed to continue as class counsel. We'll face the same dilemmas I faced last August about, "do I withdraw, do I take a part-time cut in my pay so I can go work out of my home a few days of the week without pay, but continue working on the case?" Why would I do that? Because these are my clients.

That's the reason I made the motion last summer. I believe I took an oath to represent these clients, and I do not relish the idea of abandoning them. We had, as I'm sure lawyers in all the other class actions have, contacted other attorneys, contacted some private law firms, to take over the case. When they heard about the three file cabinets of materials, the weekly monitoring that I'm doing from hundreds of cases that come into the office that I monitor, the law firms said, "Gee, we thought maybe we could help out at trial. We thought maybe we could do a little discovery. We didn't really have that in mind." They don't do this kind of litigation and they really couldn't be taking over this case. It's a huge job. So I don't really imagine someone else taking over the case who's not in legal services.

5. See *Varshavsky v. Perales*, 608 N.Y.S.2d 184 (N.Y. App. Div. 1994).

6. *Id.*

There are a few other cases I've been allowed to work on just by the fortuity that a judge denied class certification. And, of course, we still have the leverage to litigate the case because we brought the case as a class action, and moved for class certification. The defendants know we're serious. We still have the leverage and the forum to litigate class-wide policy and practice claims. With new cases now, since I can't now bring a class action, I won't have that leverage power.

Jill is asking, "Gee, how are people doing it?" Just two weeks ago, my colleague, Nina Keilin, and I filed a case to see how this works. How does it work to file a policy and practice case and not make it a class action?

We filed a case in state court. It looks like a class action challenging policies and practices, seeking declaratory and injunctive relief. Since it doesn't have the words "class action," we're not representing anyone besides our named plaintiff. When the time comes to start discovery, we'll be limited. And when the time comes to start defending motions to dismiss, when the City tries to moot out our client, we're not going to have much of a way to keep the case alive. And we can't get broad relief for others similarly situated.

I have another client just like this client: same situation, same legal claims, same need for assistance, but she happens to live in Nassau County. I can't intervene her in this case if I don't bring it as a class action because there's no venue in a New York City state court for her claim. If I could move for class certification, then I could make it statewide and anyone in the state could join in. But in New York County bringing in a Nassau County plaintiff is not going to work. So I have spent the last few days on the phone calling every private attorney I know and every legal services office in Nassau County and Long Island, begging them to please take this case and represent this woman. She needs help. She has Alzheimer's Disease. She needs home care.

While the transition has not been so bad so far, as time goes on, what will gradually squeeze the blood from us is the attorneys' fees provision.⁷ Attorneys' fees operate on a backlog — you bring these cases, and then twelve years later you get your attorneys' fees — so our office should have those coming in for a while. And, fortunately, for cases that I'm still litigating, like *Varshavsky*, I'll be able to collect fees in 2020 or so. But, of course, no new cases can

7. See 45 C.F.R. § 1642.3 (1998).

be brought requesting fees.⁸ That pays a substantial part of our budget, and eventually that will cause a real drain on our office.

Eventually, I don't think I could work under the restrictions. I've been able to make it work so far, and I think that can continue for a while. But I absolutely agree with Jill. I think no lawyer who does this work could say, "I'm only an impact litigation litigator, I only represent people in individual cases." If you're looking at these issues, if you're looking at these clients, and looking at the most efficient way to represent them, you can't divide your work up into these neat categories. You have to use every one of these kinds of strategies and tools. Not to use any one of them would be doing your clients a tremendous, tremendous disservice. Eventually I won't be able to do that. Eventually, I hope, the restrictions will not be in effect anymore.

LUCY BILLINGS:

I am probably going to echo a lot of what Jill and Valerie have said. Probably all your stomachs are growling, so I'll try to be relatively brief.

Like Jill, my work at Bronx Legal Services over the last eight years has been funded totally by non-LSC funds. My primary responsibilities have been to reach out to and maintain communication with client groups, to determine critical problems where intensified advocacy is needed, and to work with other attorney supervisors in the program to identify issues that affect substantial numbers of our clients, very low-income persons in our community, which is primarily the South Bronx, and then to undertake affirmative, complex, and often class action litigation in these identified priority areas for the program, and also to coordinate related representation in legislative and rule-making forums. So you can see, just from that brief description of my responsibilities, that they are dramatically curtailed by the LSC restrictions.

One of the things you do when you work with community groups is you reach out to them, you meet with them, you advise them of their rights in certain areas of the law, and in the exchange you determine that they are in situations where those rights are being threatened. In the past, we could advise those clients or potential clients that Bronx Legal Services was available to represent them in those situations. The LSC restrictions curtail us from doing that.

8. See 45 C.F.R. § 1609.3.

Many of you know that class actions are not just a way of representing large groups of persons similarly situated at one time, but they are also a powerful tool even for the named plaintiffs to obtain quick and effective relief for them by simply initiating a class action. But beyond that, of course, class actions provide procedural mechanisms through notice to the class, for example, and discovery, as Valerie referred to, to find out about and make contact with others whose rights are being threatened who would not otherwise be protected.

When the restrictions came down last August, I was centrally involved in at least four class actions that I had to find alternative resources for and would not have been able to dispose of if IOLA funds had not been available. I simply was not able to find any other attorneys in the City to take the cases.

One of the cases had been going on since 1985, where I was representing an organizational plaintiff in addition to the class of individuals, meeting with that group since 1983. We ultimately brought the class action in 1985. In three of those four cases I was representing a class of children throughout New York City under seven years old: tenants in privately owned housing, tenants in public housing, tenants in federally subsidized housing, and children in day care, preschools, and kindergartens, regarding enforcement of New York City's very protective statutes against lead paint poisoning.⁹ Of course, all of these children under age seven were also drug dealers. In the fourth case I was representing African-American and Latino tenants who claimed that the City housing agency's lax enforcement of housing maintenance laws discriminated against those groups.¹⁰ Bronx Legal Services had to dispose of not only those four cases, but also many others in which I and various other attorneys in the program were involved.

The restriction against attorneys' fees is perhaps *the* most onerous restriction. Even though it seemed in the beginning that, "Oh, my gosh, I have to dispose of these class actions," and that restriction had the most dramatic impact on our practice, now, in looking to take on new cases, I have realized that in almost every case we

9. See *German v. Federal Loan Home Mortgage Corp.*, 885 F. Supp. 537 (S.D.N.Y. 1995); *N.Y.C. Coalition to End Lead Poisoning*, — A.D. 2d —, 668 N.Y.S. 2d 1 (1st Dep't 1997); *Santiago v. N.Y.C. Board of Health*, N.Y. L.J., May 8, 1997, at 28 (N.Y. Sup. Ct.)

10. See *3004 Albany Crescent Tenants' Ass'n v. City of N.Y.*, N.Y. L.J., May 8, 1997, at 1 (S.D.N.Y.)

bring in legal services there is a potential for attorneys' fees recovery based on various federal and state statutes.

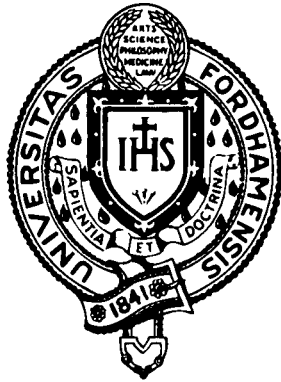
Forget about whether we ever recover those fees, forget about the additional resources those fees bring to legal services programs; these claims increase our clients' bargaining power and, hence, their ability to settle favorably. And, as Jill alluded to, they are a powerful incentive for our clients' adversaries to discontinue their illegal conduct in the future.

And, of course, a necessary concomitant of both successful and unsuccessful litigation is legislative and rule-making advocacy. If litigation is successful in striking down a statute as unconstitutional, then you have to become a player on behalf of your clients in the legislative process that will amend the statute to make it constitutional. If the court finds that a statute or a regulation does not mandate relief in particular situations, does not have specific enough provisions to protect your clients in particular situations, then the full pursuit of your clients' claims means engaging in the legislative or the rule-making process to try to amend the statute or regulation to provide those protections.

Just to try to give you a sense of what I have been doing since the restrictions were imposed, because of the ethical implications of the attorneys' fees restriction and the other restrictions, I mainly have been concentrating on bringing to disposition the other complex matters I was handling that were not class actions, and I have taken over some of the other more complex litigation in the program — employment discrimination cases, for example — and some of the appeals. I have spent quite a bit of time trying to recover attorneys' fees in cases we brought before the restrictions were imposed where we still are permitted to collect attorneys' fees.

But I have heard some of us still in legal services try to rationalize the situation a bit. The restrictions have given us an incentive to find ever more creative ways of representing our clients. Being that our clients always have had two strikes against them, it always, in my twenty-four years in legal services, has spurred us on to ever more creative lawyering, which is one of the reasons we legal services lawyers are so terrific. We now have found more and better ways to represent our clients, once again, a testimony to how good we are. But in many situations it is really just a second-best substitute, as in the situation Valerie described. In that kind of situation it is simply unacceptable.

Like Jill and Valerie, I am a plaintiff in the New York-based litigation challenging the legal services restrictions. As you know, we have been subjected to a lot of criticism by persons who believed the litigation would backfire and be the death knell of the legal services program entirely. The bottom line for me in becoming involved in that litigation is the ethical implications these restrictions have on our practice, in not being able to use every applicable law, every available legal procedure, and every available legal means of advocacy for our clients, and the implications such limitations have for the profession as a whole, that some lawyers who represent some kinds of clients are being told they cannot use all the available legal means to represent them. For that reason I believed this litigation simply had to be brought.



ADDRESS: THE FUTURE OF LEGAL SERVICES

ALEXANDER D. FORGER:

Your distinguished Dean, John Feerick, is role model enough for more than one law school. I'm happy to be here. My friend Alan Houseman I've called "the George Washington of legal services," but he rejects that title. But he certainly is the archivist and the author and founder and guider of so much of legal services that it's always really an honor to be involved with Alan. From time to time, he is described as a "legal services lawyer," and I'm sure he's proud of that mis-identification because he is, indeed, a legal services lawyer.

I guess it was Bill Dean who said that I came on like gangbusters in my ten minutes, and I'm sorry about that. But I've been under wraps for three years in Washington, where you appear before congressional committees for so-called hearings, but they're really listenings. You're there to be pounded on by the committee. But there is always the need when you are representing a program for great deference and restraint. While you might wish to throttle most of those engaged in the hearing, that isn't acceptable conduct. Now I'm going through the bends, having been free for three months, and the wounds are beginning to heal.

I'm sorry the title of these remarks is called, "The Future of Legal Services." That's why I came today, to learn the answer, and I think each of you who has spoken today has made a contribution to that issue.

When I went down to Washington at the end of 1993, it seemed like the Golden Era was dawning for legal services. For the first time in twelve years, everything seemed then to be lined up, the stars, the moon. We had a friendly Administration that was supportive, we had a supportive Board, as well as a supportive Congress, so it looked as if there would be an opportunity for this program to expand and to experiment with innovative ways of providing legal services for the disadvantaged in our country.

The first jolt I remember receiving was early in 1995 at the Senate Appropriations Committee. Senators Gramm and Hollings teamed up on we unsuspecting witnesses. The senators had just learned of a lawsuit brought in New Jersey by a legal services pro-

gram questioning New Jersey's new welfare reform legislation.¹ That was sort of the opening round of many to come.

Even Senator Hollings, who had been a strong supporter of legal services, joined in Senator Gramm's commentary which sounded something like this: There are too many people riding in the wagon and not enough pulling the wagon. Welfare as we know it must be reformed, so too must the legal services program. It must be brought back to where it was when Louis Powell was advocating on behalf of lawyers for legal services. You folks have lost your way. Class actions have run amok, and what you're doing is engaging in political activity under the guise of assisting poor people. The fact is that what you are seeking to do is to oppose that which we, the legislators, have been elected to do. What you are doing is thwarting the will of the country when you bring cases like that.

This senatorial upset led to the floor debate a few months later of the Gramm/Hollings-sponsored bill to prevent legal services-funded programs from representing people in litigating welfare reform. That seemed rather shocking to us in the bar and in legal services programs. As the debate on the floor went forward, the questions were put, I think by Senator Wellstone and others, to Gramm and Hollings, such as: "But suppose the reform, so-called, is patently unconstitutional, and suppose it states that only blue-eyed people, and not green-eyed people, can have welfare?" The answer was: "Somebody else can contest it. If that's unconstitutional, so be it. But you're not going to frustrate the mandate of the legislators with federal money." The proposed restriction was narrowly defeated, but alas, not for long.

Then came the 104th Congress, where life really changed totally. You have heard the various stories that went on, which I told you of in my first appearance. In that same hearing, a freshman said to me — again astounding, I thought — "what distinguishes the program you represent from all these others requiring tough funding choices, Small Business Administration, tree planting, all of these other issues that are very important to our constituents. And how can you conceivably distinguish yours?"

Fortunately, I recalled there was a Constitution. I didn't see anything there about tree planting or small business, but there was something about justice in the Constitution, and particularly in its Preamble. I offered that up as a sufficiently distinguishing factor.

1. See *C.K. v. Shalala*, 883 F. Supp. 991 (D.N.J. 1995).

The amount of funding was less of an issue than that of the class actions. As I went from one member of Congress to another to plead for the program, this type of litigation became the focal point of criticism. There was a sense that the program was founded for the purpose of handling the routine, day-to-day problems of poor people and that what had evolved was major impact litigation, which had politicized the entire program. While I tried to remind folks of the original concept of the Legal Services Corporation, its ability to serve the poor in the same manner as those who can pay and have all of the tools and options available, that original purpose was lost. Also, you will recall the other piece of the Legal Services Corporation mandate was to seek to improve opportunities of poor people. Today that is now anathema, being viewed as political and foreign to day-to-day legal work.

The class action then continued as the major factor. I had the impression that many in Congress literally believed that a class action meant "the lower classes against the upper classes." There really was a lack of awareness on the part of most of what a class action was all about, except it was bad. Like obscenity, they could sense it when they saw it.

And even our great staunch friend, Senator Domenici, said, "You have to eliminate class actions if you expect the Senate to be supportive of this program. I have to be able to stand up on the floor and say 'no more class actions.'" "Although," he said, "I could live with only a partial restriction on class actions, I think I have to give assurance that there are to be no more class actions permitted." And so came the demise of the class actions.

A word about the Legal Services Corporation itself:

- It is a not-for-profit corporation directed by a bipartisan Board, nominated by the President and approved by the Senate.² We now have a former Congressman on the Board who is known to many in Congress. But that, in itself, doesn't seem to make a lot of difference.

- We have a new President who is a Republican, and I don't think that makes a big difference. It would if he were a "liberal Democrat," I'm sure.

- And then, there is the staff — hard-working, dedicated — who know the program in and out, and they are caught right here in the middle. Their friends say, "How could you possibly be promoting these restrictions, much less enforcing them?" But, that is their

2. See 42 U.S.C. §§ 1996b-c (1998).

job, and they do it well. They are great folks. So they're really in a bind.

- Then we have a union — Dwight, where are you? We do have a Union. Of course, when I was Chair of Legal Services of New York, Legal Aid Society, I was exposed to the Union which picketed my office and urged Chase Bank to discharge my law firm because it alleged that I was racist and had contempt for poor people. But that was just union work putting pressure on the bargaining process; I realize that.

When I spoke to the Union, as Dwight said, as I walked around later on and spoke with some of the members, they said, "How can you square the notion of technology with competence? Don't you care about competence?" That certainly aroused my thought processes. I recognize that the Union's role has been very supportive in getting us access. The UAW can open doors in Congress I cannot. We just represent people who don't matter.

But there are points of difference. The Union is interested in job security. Technology is a threat to job security, as is competition. I think one of the bright spots of all the restrictions is the requirement of competition, although people thought it undesirable — because it would require representation to be offered at the cheapest rate — that is not the case. Technology plays an important role there.

Competition was a strong issue with Chairman Harold Rogers, who has a large measure of control over our fate. He believed that programs were able to do what they wanted and never suffered any sanctions: "How many programs have you de-funded? Have you ever de-funded a program?" During the 1980s, when we had a hostile Board, but a supportive Congress, the legislation assured the programs due process rights to protect them against funding cuts simply because the Board didn't care for the kinds of cases they were bringing. So there was a mistaken view that Legal Services itself never policed these programs that were alleged to be violating restrictions with the inability to de-fund.

So along came competition, which we now have. It isn't all that Congress thought it would be, but there is the opportunity through competition to introduce some new programs and new faces and new ways of delivering legal services, certainly through centralized intake and the use of technology for research and for completion of forms and the like. So we have the Union.

- And then, we have something that is a unique animal, called the Inspector General. It's like having the Secret Service living in

your organization. The Inspector General is directed to check on fraud, waste, and abuse; that's his mandate. But there isn't anything in this world that you can't embrace under that umbrella at some time. As I used to say to him, "You could come in here and tell me that I'm being wasteful in the way I'm using pencils and paper. There's nothing outside your jurisdiction." And he searches out your imperfections and freely reports the same to Congress, whether it be the use of frequent flyer miles, credit card charges, or the use of a parking space. Our detractors delight in hearing of our perceived human frailties. You haven't lived until you've had an Inspector General in your household.

But back to predicting the future of legal services. That's really anybody's guess. The Corporation itself is one discrete piece. Prior to 1974, legal services to the indigent was a matter of private charity. OEO was there for a bit, but before that it was basically lawyers volunteering to help those in need of access. So the LSC history is relatively recent.

I did refer to the notion of a civil *Gideon*.³ Some of the purists say: if LSC is terminated, we'll have *instanter* a civil *Gideon* — and one could hope for that. The rationale of the real *Gideon* of 1963, I think, is every bit as persuasive today in respect of the civil matters as it was in 1963 on criminal matters.

There are many people who would believe that the loss of freedom would be no less traumatic than the other dangers and vulnerabilities they may face in daily life. For the family out on the street with no housing, or for the spouse who is being battered and abused, or for the person deprived of needed health care, these matters can be every bit as vital as those that affect people who are faced with incarceration. Although some of the states themselves may be willing to accept this reality, I doubt the federal government will likely assume the burden, or that the Supreme Court will soon find a constitutional requirement that it do so.

So, absent that, where do we go with the Corporation? The Corporation is in trouble. I think as I said earlier, the moderates managed to hold the line against the "Cats" (the Conservative Action Team) by saying "we're reforming and we're taking care of the abuses and the excesses." And the definition of what constitutes abuses and excesses seems to be whatever is controversial. When there is a plaintiff and a defendant, there is naturally a difference of

3. See *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that the Sixth Amendment is applicable to states through the Fourteenth Amendment and indigent defendant in a criminal prosecution has the right to have counsel appointed for him).

opinion, a controversy. Under the guise of eliminating controversy, what is being eliminated is that sort of activity which most offends influential constituents.

I have become very cynical, as you know, on this process. But seeing it close at hand is something totally different than one would see from the vantage point of a law firm in New York City when dealing with Congress on matters of banking or tax. When you're there representing people who lack influence or clout, the door is generally closed.

Indeed, the more popular side of justice is the enforcement side. It's most distressing to see in the budgetary process that the Department of Justice frequently receives more money than it requests, and it gets that money because the promise of more border guards, more prisons, and more FBI agents pleases the voters back home. It is difficult to digest the usual statement in the appropriation process that "We all have to tighten our belts." When it comes to funding for justice, you know, one side is bulging and the other is really starving. The provision of legal services to the poor has never been a money issue.

Before I left, I spoke with Congressman Rogers, on our Appropriations Subcommittee. He believed that the conservatives were angry this year because they felt cheated last year. There apparently was an agreement that LSC would get \$141 million last year, and indeed that is what came out of the Committee. But then the moderates rebelled and that didn't happen. I think what they had in prospect was \$141 million last year and zero this year. The conservatives had the protection of a parliamentary rule of procedure through the Rules Committee which it is said we will not have this year. And at the recent hearing before Rogers' committee, the chair wanted to know how much money it would cost to phase out the program — not an encouraging sign.

Congressman Rogers professes to be a supporter, and I believe he is, but he is subject to the influences of all of the hierarchy. If you are a Subcommittee Chair and you do not have a prospect of running for the Senate, you want to do well in the House, so you do not readily disappoint the Chair of the Appropriations or the Chair of the Budget or the Chair of Rules or the Speaker of the House. This party discipline can be very effective.

I think what is likely to occur in the House is some effort to change the LSC structure. McCollum and Stenholm had their differences a year or two ago when we were in reauthorization hearings. Stenholm, a Democrat, supporter of legal services, wanted to

put the program under the Department of Justice. But McCollum, who was our adversary in an earlier age and who is now our ally, held out and prevailed.

In the reauthorization process, the Judicial Subcommittee chair, George Gekas, is masquerading as a supporter of legal services. His grievance is only, as he will say, against the bureaucratic structure in Washington called the LSC. So what he proposes is to eliminate the Corporation and put the program in the Department of Justice, which in turn would make grants to entities created in each state, which in turn would make grants to programs. As I pointed out, it seemed to be adding another element of bureaucracy there. He also said it would only have a five percent overhead charge per year. Legal Services Corporation has been at about three percent. I pointed that out, but that didn't seem to register.

And then, he has proposed eliminating the controversial and political cases. The program would be limited to twelve kinds of cases. As I recall, two of the kinds of cases might support his objective but not do much for poor people. One was probate, and, as you all know, poor people are waiting to probate their wills and manage their estates every day. Another was quiet title, and, of course, poor people are always seeking to clear up title to their homes and country estates.

There is so much smoke blown in the legislative process, together with the anecdotal rhetoric, that you reach the point where you can't really believe. Do not ever breathe in what's out there, and you shouldn't believe what you see.

In the floor debates, the end justifies the means. If you're against legal services, you say whatever you want; that's okay. You can even make up quotes, as was done by Representative Dornan of California in declaring, on national television no less, that "the President of Legal Services is particularly arrogant. Let me tell you what he said: 'Congress can't tell us what cases we can take.'" A pure, absolute fabrication. I brought that to his attention. Makes no difference. There is no accountability. You say what you want to say — black is white or red — and you pass around all of the long ago discredited stories. That is why I objected when my colleague on this morning's panel seemed to be using one questionable case as if representative of all LSC does. But that's the mood. Most of Congress doesn't really know much about legal services, what it does, or the importance of its work, and they take direction from the detractors.

The Farm Bureau is by far the most powerful influence. I think, if Congress dared to do so, they would eliminate permitted representations of migrant workers. The Farm Bureau, in its zeal to discredit LSC, alleges lawyer misconduct such as extortion, blackmail, and the like. It does so because LSC is extremely unpopular in its efforts to enforce employment, housing, and environmental requirements to which the growers are subject.

The next adversary, and to me the worst, because of its nomenclature, is the so-called Christian Coalition. There is little Christian about this group and little that is religious. It's basically political. It has an agenda that doesn't stand any test of reason. They have now changed their nomenclature. Instead of calling for the elimination of Legal Services Corporation, they call for its privatization, which of course means the elimination of Legal Services Corporation. But they're learning to use the language.

I think that the House is likely to come out with some element of restructuring. It may go to the Department of Justice. If it does, that really would be a fatal blow to the Legal Services Corporation. The Senate, at least for now, I think will help sustain us. We likely will get through the next year or two, but if you heed the words of McCollum, we need to prepare for the day when there is no federal legal services funding.

While major metropolitan areas will be better able to survive, there are many jurisdictions in which federal funding represents ninety-seven to ninety-eight percent of the money expended on legal services. It is those areas that have no alternative. Obviously, from their point of view, it is better to have some life than none. And they do not share the view expressed by the some who recently contested the latest restrictions that it may be more valiant to end federal funding than letting it acquiesce in burdensome restrictions.

On the executive side of government, the Administration has been a disappointment in its advocacy for the program. We had to struggle with OMB to get them to ask for \$340 million this year instead of \$305 million, as they originally proposed.⁴ And while the White House has been visible and vocal in support of NEA (also on the Congressional hit list), including the President's re-

4. The final appropriation to LSC for the fiscal year 1997 was \$283,000,000. Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 1996).

marks in his State of the Union Address,⁵ little has been said about legal services for poor people. I think the White House could save us, if we were a major priority. And it may yet do so if LSC actually faces extinction.

You know, I'm sympathetic to all of the stories we heard about the class actions. These and the other restrictions are in most instances inappropriate and unduly burdensome. But Congress can give and Congress can take away. As I said earlier, it wasn't that we sat down to bargain, because we never know what's coming out until it's printed.

Maybe Congress could dream up a few more restrictions (I don't know what would be left). Perhaps no litigation. Maybe no migrants. Certainly the lawsuit in Texas,⁶ questioning absentee voters, may prompt a prohibition on civil rights. There are not too many items left in that restrictive category.

So I think we may squeeze through for another year or two. Perhaps, if the political climate changes, that will help.

What can we do there? What we're trying to do is broaden the base of support for legal services. Like Tip O'Neill says, "all politics is local." I can walk through the halls of Congress reciting the Preamble to the Constitution, and that doesn't even attract the floor sweeper. It makes no difference. What matters is what happens in the local congressional office.

The lawyers alone are suspect. Charles Taylor advocates the end of LSC and federal funding of legal services because it's the lawyers' responsibility and they can provide all of the service that may be necessary. Indeed, the more they cut the program and the more poor people continue to be served, it's self-proving, because there will always be some poor person who is being served. The notion of mobilizing the bar in support of legal services is important, but we are suspect because Congress says we are merely trying to shift our burden under Model Rule 6.1⁷ to somebody else.

One bright spot on the horizon is the Interfaith Alliance, which is a broad-based, religious consortium with chapters throughout, I think, forty states now. Walter Cronkite has recently taken a public position in support of the work of the Alliance and his opposition to the Christian Coalition. This group will be in close touch with the members of Congress in their local communities.

5. *Presidents Clinton's Message to Congress on the State of the Union*, N.Y. TIMES, Feb. 5, 1997 at A20.

6. *Casarez v. ValVerde County*, 957 F. Supp. 847 (W.D. Tex. 1997).

7. MODEL RULES OF PROFESSIONAL RESPONSIBILITY Rule 1.6 (1997).

We were talking about asking the law school communities to adopt a Congressman and let the member of Congress know how many constituents are being served or how many were referred by his or her office to a legal services program.

I tried to interest the business community in the issue of justice. One CEO said that if I could interest twelve other CEOs of the Fortune 500 that he would go forward and do ads and the like. I could not get another CEO to sign on. There's nothing in it for business. Shareholders, I guess, aren't going to be terribly interested.

But what is the view of the public at large? One clue was in a poll taken just before the 1996 election. This was taken in Stark County, Ohio, which is said to be a bellwether community.⁸ It is conservative in political composition. A series of questions was asked in the poll, one about welfare. Yes, people ought to get off welfare and go to work, et cetera. One question was "do you think they should cut funding for legal services to poor people?" and by two-to-one the answer was "No." I think people in the community understand it's an issue of fairness. And your neighbor should have a chance to obtain legal help when necessary.

Apart from the Legal Services Corporation, we see many other components of the delivery system that will affect the future of legal services. Of course there will always be legal services providers. The many programs like Legal Aid that now exist outside of the federal system are very important, as well as the entire private bar doing its pro bono and volunteering. As to financial support — I think the states and local governments are now becoming involved in enacting filing fees, lawyer registration fees, expanding ILOTA, and enacting general appropriations both at the state and the local level. One good result out of our current siege has been a mobilization of the states. They recognize that it is important for their well-being to provide this. We are experimenting in the domestic violence area with the use of technology in courtrooms and victim centers enabling an individual client to print out court papers and other documentation, thus facilitating access.

And then, there is also the simplification of law and the use of paralegals, all of which I think will be greatly expanded as time goes on because of the force of circumstances. But the critical importance in the Legal Services Corporation in this respect is the structure that it provides. We found that the presence of a perma-

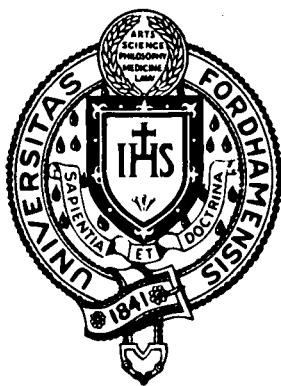
8. See generally Michael Winierip, *An American Place — Shifting Allegiances; Backers of Bush in '92 Are Turning to Clinton*, N.Y. TIMES, May 27, 1996, at A10.

nent office is essential in providing structure for the volunteer effort. The staff provided training, case assignment, support, and oversight. This is particularly important to those volunteers who may be unfamiliar with the legal issues requiring resolution. There are some 130,000 or 140,000 volunteer lawyers now engaged in this program.

Query: what is the future of legal services? I am confident that there will always be the ability to provide legal services for many of those in need. We are never going to reach all eligible clients or resolve all their problems. But it is essential to keep pressure on the federal government to play its essential role. How can it walk away from all of the mandates in our fundamental documents and leave it to charity to assume access to justice?

So while we're all talking to the converted — save one, perhaps — it is an important program that Fordham sponsors. It's vitally important for people to start discussing not only the problems that we have, but how we're going to solve them.

For me, as I've said on many occasions, my three years in Washington was the best job a lawyer could have. There could be no more nobler cause with which to be associated, and no more dedicated and heroic figures to work with than those engaged day to day in the front line of service. It is particularly encouraging to see so many young people and law students interested in public service. That's one of the more encouraging aspects of the view from the Washington scene. There isn't too much there yet to be excited about, but we've lasted 200 years. We'll probably go on for a little while longer. Thank you.



CONSTITUTIONAL ISSUES PANEL

MATTHEW DILLER:

There have been three lawsuits brought that deal with these constitutional issues, two challenges to the Regulations and one opposition to a motion to withdraw, which was the *Varshavsky*¹ case that Valerie Bogart talked about. The decision in the *Varshavsky* case is outside. There is also a preliminary injunction decision from the case brought in Hawaii,² of which Steve Shapiro is one of the counsel, and that decision is outside. And then, still pending is a decision on a preliminary injunction motion in a case called *Velasquez*,³ which was brought in the Eastern District of New York.

Here to address these issues we have three distinguished experts on constitutional law. I'll introduce them in turn before they speak. Going first will be, to my right, Eric Freedman, who is an Associate Professor of Law at Hofstra University School of Law. He is an expert in constitutional law with a special interest in, among other things, the First Amendment. He is also Chairman of the Civil Rights Committee of the Bar Association of the City of New York. The Civil Rights Committee is currently working on a report on the LSC restrictions. He is also a graduate of Yale Law School, where he was an Editor of the *Yale Law Journal*. I'll turn it over to you, Eric.

ERIC M. FREEDMAN:

Thank you.

It's true that the Civil Rights Committee of the New York City Bar Association, which I preside over largely by the device of encouraging everybody else to do work for which I can take credit, is working on a report on the subject of these restrictions. The people who are actually doing the work are Professor Steven Loffredo, who teaches poverty law at CUNY, and Emily Sack, whom you'll be seeing on the next panel. All of you are encouraged to improve our work by providing them with material, thoughts, ideas, and data. But, of course, I speak here only for myself.

1. See *Varshavsky v. Perales*, 608 N.Y.S.2d 184, 202 A.D.2d 155 (1st Dept. 1994).

2. See *Legal Aid Soc'y of Haw. v. Legal Serv. Corp.*, 961 F.Supp 1402 (D. Haw. 1997).

3. See *Velasquez v. Legal Servs. Corp.*, 985 F. Supp. 323 (E.D.N.Y. Dec. 22, 1997).

I'm glad to go first on this panel, both because I need to be less clever in what I say to distinguish myself from what already has been said, and also because a couple of later speakers — who, as you will hear, have somewhat more credentials in litigation and in constitutional theory — can correct me where I go wrong. And, perhaps not coincidentally, after I say a few brief words about legal theory and the litigation outlook, my conclusion is going to be that neither of those subjects is really where the focus probably ought to be in the larger picture.

Now, the reason I can be fairly brief about the legal theory and the litigation outlook is that, as the litigations to date have shown and as I suspect this panel will demonstrate, as the issues have been framed in court to date, the range of disagreements is actually quite narrow.

To quote Burt Neuborne in his latest brief in the *Velazquez* litigation in the Eastern District (a brief that I recommend to all of you, by the way, because it contains the fullest available constitutional attack on the LSC Regs): "The issue has essentially narrowed to the question whether the LSC's new Regulations provide a meaningful opportunity for LSC recipients to engage in restricted activities using non-LSC funds." In short, the parties are contesting the "affiliated entity" issue. And that issue has to date largely been fought out on the terrain of the First Amendment, with a polite bow to a few other theories, like equal protection and access to the justice system, that nobody has devoted very much attention to.

The reason that the issue has narrowed that way is that, unlike some Congressmen, the lawyers on both sides have been quite realistic in their reading of the existing case law. Everybody has done a very moderate, sensible, professional job. And specifically, the plaintiffs have not yet seriously challenged the restrictions on the use of federal funds. The reason is straightforward: the test that emerges from *Rust v. Sullivan*,⁴ a case in which Steve was involved, is that where the government subsidizes an activity it can impose restraints reasonably designed to make sure that only that activity is being subsidized. So, to use Justice Rehnquist's example from *Rust*, the National Endowment for Democracy can impose restrictions to make sure that it's not subsidizing Communism or Fascism. And, as everyone implicitly recognizes, this is an objective, not a subjective, determination.

4. 500 U.S. 173 (1991)

To take a slightly different example, I'm sure some of you remember *United States v. O'Brien*,⁵ the draft card burning case. Now, the subjective intent of the legislators in banning destruction of draft cards was to crack down on hippie, war protester, draft card burners. But objectively, a prohibition on the destruction of draft cards could certainly be held to be reasonably related to the administration of the draft, and so it was upheld.⁶

Similarly here, restrictions on representing prisoners, let us say, will in all likelihood be upheld as a decision that other groups are more urgent recipients of subsidized legal services, even though subjectively all the legislators hate prisoners. After all, government subsidies almost always go to favored groups and away from disfavored groups. So the plaintiffs have not really spent a lot of energy — and it is probably a wise use of resources — in attacking restrictions on the use of federal money.

It is possible, of course, to think of extreme circumstances where there's no way that the restriction furthers the objective of the activity at hand. So, for instance, the recent Eleventh Circuit case,⁷ another ACLU case, invalidating a state statute that gave money to all university student groups except the gay group, is an example where there's no possible explanation that the restriction is designed to further the purposes of the program. But, with regard to the restrictions we're talking about, both sides seem to think we're not in that area.

Specifically, the LSC, perhaps a bit belatedly, after losing both in the New York Supreme Court in the *Varshavsky*⁸ case and in the District of Hawaii in *The Legal Aid Society of Hawaii*⁹ case, now recognizes — implicitly if not quite explicitly, because it sometimes likes to keep throwing in these meaningless rhetorical flourishes, like “money is fungible” (a proposition that does not decide any case)— the core rule. The LSC basically argues that, with respect to non-federal money, the government has no business imposing any restraints broader than those needed to make sure that there is the required separation between activities that can and cannot be done with federal funds. And the only legitimate purpose of the affiliate rules is to insure that.

5. 391 U.S. 367 (1968).

6. *See id.*

7. *See Gay Lesbian Bisexual Alliance v. Pryor*, 110 F.3d 1543 (11th Cir. 1997).

8. 608 N.Y.S.2d 184, 202 A.D.2d 155 (1st Dept. 1994).

9. 961 F. Supp 1402 (D. Haw. 1997).

In an effort to come up with valid regulations to this effect after the loss in the *Hawaii* case, the LSC promulgated regulations that were modeled on the ones in *Rust v. Sullivan*.¹⁰ So, as Alan Houseman suggested this morning, the issue between the parties, and the one to which Burt's latest brief is addressed, narrows to the restraints on non-federal funds and to whether (a) these regulations are in fact the same as those in *Rust*,¹¹ and (b) if so, whether that is good enough in this context.

On that second point especially, I rather think that Burt Neuborne has the better of it. There is a key distinction between two types of cases. On the one hand, you have the type of case like *Rust* where the government is the speaker and the recipient of the subsidy, the doctor, is just a conduit for the speech of the government.¹² On the other hand, you have the type of case like *Rosenberger v. Rector*,¹³ which involved funding of student activities at the University of Virginia, and *FCC v. League of Women Voters*,¹⁴ which involved a ban on editorializing by stations that received any amount of money from the Corporation for Public Broadcasting, cases where the recipients are speakers on their own behalf who also happen to be receiving subsidies. And this case is of the second type.

However, having said all that, one would also have to say that if this case were to go to the Supreme Court, it's at best questionable how it would come out. Leaving politics entirely aside, one reason for this, which I'm sure Professor Mc Ginnis is going to enjoy commenting on, is *Chevron v. Natural Resources Defense Council*,¹⁵ arising here in all its ironic glory to absolutely persuade anybody who wasn't already persuaded what a fantasy-land Washington is.

The LSC, as was correctly said this morning, has written regulations to make the statute as defensible as possible, even though there's very good ground to question whether those regulations are in accord with Congressional intent. A good ground to question it is, first of all, all the fantastic set of quotes that are lovingly paraded in the *Varshavsky*¹⁶ opinion (which makes great reading) about how we are going to de-fund the Left and how we are going to make sure that these organizations which get any part of our

10. 500 U.S. 173 (1991).

11. *Id.*

12. *Id.*

13. 515 U.S. 819 (1995).

14. 468 U.S. 364 (1984).

15. 467 U.S. 837 (1984).

16. 608 N.Y.S.2d 184, 202 A.D.2d 155 (1st Dept. 1994).

money don't get to do all these horrible things that we don't want them to do.

And second, and perhaps more directly to the point, is the very hostile reaction that the LSC representatives got when they last showed up in Congress and were viciously attacked by Congressmen for promulgating regulations that undermined the intent of the statute. And that's entirely true; the regulations did undermine the intent of the statute in an effort to defend the constitutionality of the statute in litigation.

But, having done that, under *Chevron*,¹⁷ the courts are going to defer to the interpretation of the statute given by the agency and, as a result, it's perfectly possible that the statute may be upheld on the basis that these implementing regulations make it constitutional. In short, it is at least possible that because the LSC staff of talented legal professionals has so successfully succeeded in undermining the congressional intent as to make the statute constitutional under *Rust v. Sullivan*.¹⁸

However, enjoyable as all that may be, in the end one has to say that it is really all aimed directly at the capillaries. The truth is that, no matter how idealistic or cynical you are about legal doctrine, at the very best, First Amendment doctrine only provides breathing space before the majority works its will. That's what it's designed to do, and, when it's functioning at its best, that's what it will do.

So whether or not you think these litigations should have been brought, they constitute a holding action at most, and the ultimate answers here, as we just heard from Alex Forger, are going to be legislative. I think it would be simply short-sighted to ignore that and to fail to seize every opportunity for building coalitions, for seeking to appeal to mainstream, centrist, fairness ideas in order to do everything possible to win in the legislative arena. I think we here, sitting on a constitutional panel, have to recognize that, with the possible exception of a few relatively marginal issues, ordinary politics is going to determine how this is resolved, and the outcome of these issues will depend on nothing more or less than the passion with which people mobilize votes. That, after all, is what got us to where we now are, and if we are to get to somewhere else, that is what's going to do it.

Thank you.

17. 467 U.S. 837 (1984).

18. 500 U.S. 173 (1991).

MATTHEW DILLER:

To the extent that Eric has identified the constitutional issue as kind of a *Rust v. Sullivan II*, we are very fortunate in having as our other panelists two experts on constitutional law who are both involved in different ways in the *Rust* litigation.

First, we have John Mc Ginnis,¹⁹ who is a Professor of Law at Cardozo School of Law, where he teaches courses in constitutional law, international trade, law and economics, law and biology, and so forth. He is a graduate of Harvard College and Oxford and Harvard Law School. He also served as Deputy Assistant Attorney General in the Office of Legal Counsel in the administrations of Presidents Reagan and Bush. He writes extensively on constitutional issues, and the First Amendment in particular. He is also the 1997 recipient of the Federalist Society's Paul M. Battor Award given to an outstanding scholar under the age of forty.

Our next speaker is Steven Shapiro. He's the National Legal Director of the American Civil Liberties Union, the nation's oldest and largest civil liberties organization. As Legal Director, he supervises a staff of nearly fifty lawyers that are involved in hundreds of civil liberties cases throughout the country. Among other duties, Mr. Shapiro directly supervises the extensive litigation activities of the ACLU before the U.S. Supreme Court. The ACLU routinely participates in more Supreme Court cases each year than any other private organization. Mr. Shapiro is a graduate of Harvard Law School. Steve.

STEVEN R. SHAPIRO:

Thank you, Matt. I must say I disagree strenuously with Professor Mc Ginnis's view of the Legal Services Corporation, and also with his view of what legal services lawyers do and ought to be doing.

Legal services lawyers do not go into court and win cases because they make policy arguments that judges accept. They go into court and win cases - and they win a lot of cases - because they can convince the courts that the government is acting unlawfully: either that it is disregarding the statutes that it has passed, or that the statutes that the government has passed are inconsistent with overriding constitutional law. When legal services lawyers do that, when they insist that the government comply with the law, it seems to me that they are not advancing a radical welfare state agenda.

19. At the request of the speaker, his remarks have not been included below.

Rather, they are performing the quintessential conservative task — one that I would expect conservatives to applaud — and that is to insist that the government comply with its own law, both statutory and constitutional.

Having said that, let me bring people up to date on where the litigation actually stands. In the Hawaii case, we obtained a preliminary injunction that barred LSC from enforcing many of the restrictions (although, regrettably, not all of the restrictions) included in the prior regulations.²⁰ The Justice Department did not intervene to defend the prior regulations. However, it has now intervened to defend the new regulations. Both sides have filed motions for summary judgment, which are scheduled for argument in the District Court on July 28th. I fully suspect that we will have a decision by Labor Day.²¹

As Matt said, the *Velasquez* case is still sitting in the Eastern District awaiting decision on plaintiff's preliminary injunction motion. The papers in that case focused on the prior regulations. Inevitably, however, the final decision will have to address the constitutionality of the new regulations, which were not promulgated until last week.²²

I also want to address, at the outset, Eric's assertion that the decision to focus only on the restrictions on the use of non-LSC funds somehow reflected a consensus that restrictions on the use of LSC's own funds were beyond constitutional challenge. As a factual matter, it is true that the Hawaii case only challenges restrictions on the use of non-LSC funds.²³ It is not true that the New York case is so limited. The New York case includes a challenge to some of the restrictions on the use of LSC funds, although the preliminary injunction motion was limited to the restriction on the use of non-LSC funds. The decision not to challenge any of the restrictions on the use of LSC funds in Hawaii was primarily a strategic decision and, most definitely, did not reflect a legal judgment that those restrictions were constitutionally proper.

20. *Legal Aid Soc'y of Haw. v. Legal Serv. Corp.*, 961 F. Supp. 1402 (D. Haw. 1997).

21. On August 1, 1997, the district court in Hawaii granted defendants' motion for summary judgment and upheld LSC's revised regulations. *See Legal Aid Soc'y of Haw. v. Legal Serv. Corp.*, 981 F. Supp. 1288 (D. Haw. 1997). The case is now pending before the Ninth Circuit.

22. On December 22, 1997, the district court in Brooklyn denied plaintiffs' motion for preliminary injunction and also upheld LSC's revised restrictions. *See Velasquez v. Legal Serv. Corp.*, 985 F. Supp. 323 (E.D.N.Y. Dec. 22, 1997). That case is now pending before the Second Circuit.

23. *See Legal Aid Soc'y of Haw.*, 981 F. Supp. at 1288.

Indeed, my own view is that the real nub of the legal dispute becomes clearer if you focus for a moment on the restriction on the use of LSC's own funding. We talk about the restrictions - and there has been a lot of talk about the restrictions this morning - as though all the restrictions were created equal. I do not believe that is true. There are different kinds of restrictions. I think they have different legal validity. I think some would be harder to challenge; others would be easier to challenge.

But I feel very, very strongly that it is unconstitutional for the government to say, even with its own money: "We will pay legal services lawyers to represent welfare clients. They can go into court and they can claim that a welfare statute does not apply to their client, but they may not, as long as we are paying them, challenge the constitutionality of the underlying statute." I think that is a due process violation, and I don't think that the government can do that, even with its own money, any more than I think the government could say to a public defender: "We are paying you to represent this indigent criminal defendant, but because we are paying you, we will not permit you to file a suppression motion." I think it would be unconstitutional if the government said that to a public defender, and I think it's unconstitutional for the government to tell a legal services lawyer: "You can undertake this representation, but you can't with our money make the arguments that you believe are in your clients' best interests." I think, likewise, there are very, very serious equal protection arguments that can, and ultimately will be, raised when the government says to one group of people: "You may not have access and utilize the procedural devices that are otherwise available to all other plaintiffs within the legal system."

Those are not issues that are the forefront of these litigations at this moment in time, but we can't lose the forest for the trees. As much as we talk about unconstitutional conditions, and that is the legal ground on which these issues are being fought out, what is offensive about what the Congress has done in this case is the attack on equal justice for poor people. That is fundamentally a due process and an equal protection issue, and I think that there is something to be gained by continuing to think of it in those terms.

Having said that, let me just come back to the unconstitutional conditions issue for a moment. As we saw in the Hawaii case, the restrictions imposed by Congress, at least as initially interpreted and implemented by the Legal Services Corporation, were consti-

tutionally indefensible.²⁴ I think Judge Kay was correct about that. I think he was incorrect in not striking them all down. I think they should have all been struck down. But I think there can be no serious dispute, under current constitutional doctrine, that the government may not use its own funds as a lever to require individuals to forfeit the exercise of privately funded constitutional rights. That's what the statute and the Regulations were designed to do, and I think they were properly enjoined.

The case has become more complicated in the last week. The new Regulations are going to be more difficult to challenge. They do very closely track *Rust v. Sullivan*.²⁵ They do not precisely track *Rust v. Sullivan*. There are some differences between even the new Regulations and the *Rust* Regulations, and I think the differences between them are significant and revealing. But I also think they're very different in context, and in that regard I agree more with Eric than with John.

It seems to me the government has every right to say: "We are paying you money to perform a job, and with our money you can only do the job that we are paying you to do." Two principles flow from that proposition. First, the government has the right to ensure that its money is being used for the purposes it intends, and not for other purposes. Second, it has the right - or at least the Supreme Court said in *Rust v. Sullivan* it has the right - to ensure that the consumers of those services are not getting a mixed message, and are not confusing what it is the government is saying and providing with what it is that private funders are saying and providing.²⁶

In both of those ways, the legal services context is fundamentally different than the Title X family planning context that was at issue in *Rust*. For example, there is absolutely no need for the physical separation requirements and the separate personnel requirements imposed by LSC. The Legal Services Corporation has for many years conducted audits of legal services programs (which for many years have operated both with LSC funds and with non-LSC funds) to ensure that the LSC funds were being properly spent and only spent for their intended purposes. LSC has cited no empirical evidence in the Hawaii case to support the claim that legal services programs have been using federal money improperly. Lawyers are accustomed to keeping time records that segregate how they spend

24. *Id.*

25. 500 U.S. 173 (1991).

26. *Id.*

their time. It is not a big deal, and I don't think these regulations ever had anything seriously to do with the improper diversion of federal funds into impermissible activities.

Likewise, the risk that somehow legal services clients walking into a legal services office will be confused about what the government's message is and what the government's message is not has very little relevance in a legal services context. What the Supreme Court said in *Rust v. Sullivan*, at least as amplified by its later decision in *Rosenberger*, was that Title X is a government program in which the government is delivering its own message about how best to achieve family planning.²⁷ When the government pays for legal services it is not delivering a message. Those lawyers are not the mouthpiece of the government, they are in many instances the adversary of the government, which is precisely what the Supreme Court held when it ruled that public defenders could not be deemed state actors for Fourteenth Amendment purposes.²⁸

So I do not think that there is any legitimate need whatsoever to impose anything more than a stringent bookkeeping requirement on legal services programs, and to the extent that even the new Regulations go beyond that, they ought to be found unconstitutional. Now, whether the lower courts are going to be willing to say that is another question. LSC's latest briefs have a superficial appeal. When you line up the new LSC regulations in one column and the *Rust v. Sullivan* regulations in the other column, they look very much alike. However, it is an argument that ultimately elevates form over substance. If one analyzes the regulations carefully and in context, the resemblance fades. In the end, the differences are more important than the similarities. Nevertheless, in some ways I am more confident if and when this case gets to the Supreme Court than I am at the lower court level.

Let me just say one last thing and then I'll stop, because I would like to open this up for questions. Just as I don't believe this case and these regulations or the underlying congressional enterprise ever had anything really to do with protecting the federal fisc, I don't think this dispute has anything at all to do with economic theories like cross-subsidization. I take a much more basic and cynical view about all of this. I think what Congress was intending to do was to make it extraordinarily difficult, if not impossible, for legal services lawyers to bring cases that Congress disfavored for

27. See *Rosenberger v. Rector & Vinitors of University of Virginia*, 515 U.S. 819, 832-37 (1995).

28. See *Polk County v. Dodson*, 454 U.S. 312 (1981).

ideological reasons. Unfortunately, they have now largely succeeded.

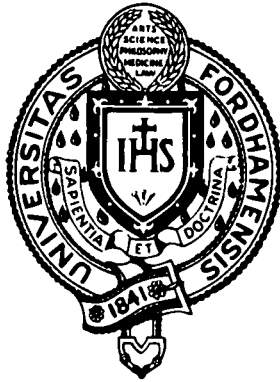
If we wind up with the *Rust v. Sullivan* rules, we will be in a better shape than if we had wound up with the rules that LSC initially adopted when the statute was first passed. But, the situation will still be dire. As Congress understood perfectly well, it will not be easy for legal services programs around the country to comply with these regulations. There is simply not enough money out there to create dual programs. And if there is enough money out there, we ought not to be spending it to create dual programs. We ought to be spending it to provide legal services for poor people who already have too little of it in this country in the first place. So I think it is very unfortunate at many, many levels that we have come to this pass. We are now on a two-track process in Congress and in the courts. Like Alex Forger, I have no better crystal ball than anybody else to know where it is all heading.

Still, having been involved in numerous conversations about these lawsuits for many months, I feel two impulses with equal fervor. Sometimes I think they are complementary and sometimes I think they are not, which is what has made this so difficult. On the one hand, I feel very strongly that we have to do virtually anything we can do to help legal services survive. It has been an immensely valuable force in this society for the last twenty-five years. On the other hand, I feel that we can't survive and lose our soul: that somehow we have to protect our right to represent our clients fully and not allow ourselves to be put in the position where we're giving our clients second-hand legal representation that no wealthy person in this country would accept for five minutes.

And so, we will see where it all heads.

MATTHEW DILLER:

Thank you.



ETHICAL ISSUES PANEL

RUSSELL G. PEARCE:

Good afternoon. My name is Russ Pearce. I teach here at Fordham and I am Associate Director of the Stein Center for Ethics and Public Interest Law.

Let me talk a bit about the agenda of this panel, which is focusing on the ethical issues relating to the restrictions. We on the panel had spoken before and had talked about two particular questions: (1) whether the ABA Ethics Opinion¹ on the restrictions is correct - and I believe there are copies of that opinion outside, if you're not familiar with it; and (2) how should the bar and individual lawyers respond to the ethical issues raised by the restrictions?

To that general question I would like to add one specific question that was discussed earlier today, not addressed by the ABA Ethics Opinion, and I would just sort of leave it for the panelists to deal with it or not. That relates to the restriction on seeking attorneys' fees. As was suggested earlier, attorneys' fees can be a significant weapon to use in litigation. So the question comes up: in a situation where attorneys' fees are available under statute and a lawyer is barred by the restrictions from seeking attorneys' fees, are there any ethical difficulties for the legal services lawyer; and, if so, how should the lawyer address those difficulties?

Before we begin, I'm going to quickly introduce the panelists, just very brief introductions, given the time of the day.

Our first speaker will be Helaine Barnett, the Attorney-in-Charge of the Civil Division of The Legal Aid Society. I should also add that Helaine is a former Chair of the ABA Ethics Committee and is currently a member of the ABA Board of Governors.

The next speaker will be Emily Sack, Coordinator of Legal Policy for the Center for Court Innovation. Emily wanted me to make sure to remind people that the Center for Court Innovation and the Center for the Community Interest, of which Dennis Saffran is the Regional Director, are two very different entities. Emily, among many other distinguished features in her background, is currently Chair of the Subcommittee of the City Bar Professional Responsibility Committee, which is, I believe, in the process of preparing a report on the legal services restrictions.

1. ABA Comm. On Ethics and Professional Responsibility, Formal Op. 96-399 (1996) [hereinafter Formal Op. 96-399].

Our next speaker will be Steve Ellmann, who is a Professor of Law at New York Law School. He is a distinguished scholar and teacher in the field of legal ethics and runs a clinical theory workshop at New York Law School for faculty throughout the area.

The last speaker is Stephen Gillers, Professor of Law at New York University School of Law. He suggested to me a line I could use for the panel as a whole but I'll use for him. He needs no introduction, but of course everyone is familiar with Professor Gillers as a leading authority in the field of legal ethics.

The way we're going to proceed is we're going to start with Helaine, who is going to summarize the ABA Opinion, and then we will go through the rest of the panelists and hear their comments and responses.

HELAINE BARNETT:

My purpose is to summarize the highlights of ABA Opinion 96-399 (issued January 18, 1996), entitled *Ethical Obligations of Lawyers Whose Employers Receive Funds from the Legal Services Corporation to Their Existing and Future Clients When Such Funding is Reduced and When Remaining Funding is Subject to Restrictive Conditions*.² Let me just say at the outset that I was not a member of the ABA Ethics Committee when this Opinion was issued, and the ABA opinions do not go before the Board of Governors for approval. With that, let me proceed to highlight and in some minor way critique or analyze some of the provisions that my fellow panelists will deal with in more depth.

In setting the stage for a discussion of this Ethics Opinion, it is important to remember the context in which this Opinion was issued and understand the circumstances which prompted the issuance of the Opinion. As we heard this morning, changes in the composition and leadership of Congress following the November 1994 election, with its focus on the "Contract with America," stimulated efforts to revisit the federal commitment to funding civil legal services for low-income people. In July of 1995, the House of Representatives had already passed an appropriation bill in which it severely curtailed the funding for the Legal Services Corporation for 1996.³ Congress was considering legislation fundamentally altering the relationship between federally-funded legal services attorneys and their clients. The intended changes governing the use

2. *Id.*

3. See H.R. 2076, 104th Cong., 1st Sess. (1995); S. 1221, 104th Cong., 1st Sess. (1995).

of LSC funds were anticipated to take place no later than January 1, 1996. The LSC had announced that competitive bidding requests were due in November of 1995.

The ABA Ethics Committee explained at the outset of its Opinion, which was issued on January 18, 1996, that the inevitability that "new LSC funding legislation will include significant funding reductions and some, if not all, of the practice restrictions contained in the proposed legislation" has "prompted members of the legal services community to request that the Committee provide guidance regarding legal service lawyers' obligations under the new funding regime."⁴ The Opinion goes on to explain that, "[b]ecause of the great likelihood that the proposed changes will be enacted, because the legislation is drafted to be effective upon enactment, and perhaps to have retroactive effect, and because we have been requested to do so, we take the unusual step of opining upon the effect of legislation which is not yet enacted."⁵ In fact, the ABA Standing Committee on Legal Aid and Indigent Defendants had urgently requested guidance and pressed the Committee for speed in issuing an Opinion even before the legislation became final so that it could distribute it to constituent groups at the ABA Mid-Year Meeting, which took place at the end of January 1996.

It is important to understand that the Committee proceeded with the assumption that the restrictions would be in place and the Opinion should give guidance as to how to deal with them. The inquiry the Committee received indicated that legal services attorneys would have to abide by the restrictions since the alternative would be no funding at all. In asking for guidance from the ABA Ethics Committee, there was, however, no consensus within the entire legal services community as to the best options to pursue. Nonetheless, the Committee took on the task with the intention neither to challenge nor to legitimate the restrictions, and proceeded to address what effect pending legislation in Congress would have on the responsibilities and obligations of attorneys who receive LSC funding. The Committee based its Opinion on the "worst-case" scenario in order to provide the most complete guidance that was possible at that stage.

Turning to the Opinion itself, it begins with a summary of the proposed legislation. In addition to severely curtailing the amount of money, the proposed legislation restricted the representation of certain classes of clients, certain specific subject matters of repre-

4. Formal Op. 96-399, *supra* note 1, at 20.

5. *Id.*

sentation, and certain methods or strategies that may be used in pursuing the representation.⁶ While recognizing that it is unusual to opine on the effect of legislation not yet enacted, there is precedent for an ABA Ethics Opinion dealing with proposed congressional legislation affecting legal services. In Formal Opinion 347 the ABA Ethics Committee dealt with pending federal legislation in 1981 that was expected to reduce or eliminate legal services funding at that time and addressed ethical obligations of legal services lawyers to their clients in the face of drastically reduced funding.⁷

However, proceeding in this way was not without pitfalls, since the legislation was a moving target. In formulating this Opinion the Committee assumed that the funding reductions that programs would face would require them to severely reduce services to existing clients; prospective restrictive conditions would severely impede competent and high-quality representation of a significant number of existing and future clients; and both the funding reductions and restrictions would require withdrawal from ongoing representation in large numbers of cases.

These assumptions may have been reasonable in the Fall of 1995, but since the issuance of the ABA Opinion the final legislation that was enacted did not include all of the restrictions originally anticipated. Indeed, in a number of important ways they differ from what was anticipated at the time the Ethics Opinion was drafted.

As a result of focusing on pending legislation the Opinion inadvertently makes reference to provisions not in fact contained in the final legislation, addresses issues that ended up not in dispute, and suggests solutions to problems which may not exist or are overstated. So I might add to the list of questions to be addressed by our panel, not only whether the Opinion is correct, but what is the relevance of the Opinion today?

It is worth noting that, while LSC programs have at a number of different points in time had some restrictions placed on the type of clients that could be represented, or even on the type of actions that could be brought, what had never been done before was to impose restrictions on the legal arsenal of tools available to a client once a person was determined eligible and the case involved an acceptable subject matter. A restriction on how to proceed with that case, and limitations on the kind of advocacy to pursue, had never before been imposed.

6. *Id.*

7. ABA/BNA Lawyers' Manual on Professional Conduct, Formal Op. 347 (1981).

It is also worth noting, and I think we will hear more from our panelists, that this ABA Opinion makes no mention of Model Rule 5.4, which deals with the professional independence of a lawyer.⁸ Section c of that provision states, "A lawyer shall not permit a person who . . . pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."⁹ Understanding the background of the specific request made to the Ethics Committee and the limits placed upon it may provide some explanation of the total absence of reference to this Model Rule by the drafters.

The bulk of the Opinion discusses the ethical issues regarding existing clients.¹⁰ The Committee found three categories of obligations to existing clients arising out of the proposed LSC legislation: the duty to prepare and plan for the reduction of services, the duty to provide for clients whose current representation will be prohibited, and the duty to ensure legal service lawyers fulfill ethical obligations to remaining clients.

In detailing the obligation to prepare and plan, the Committee, relying on the former 1981 ABA Opinion, said that three steps were required with respect to the duty to prepare for a likely change in the scope and the level of legal services: (1) notify clients of impending changes; (2) set up priorities to determine which existing clients to retain and which new ones to accept; and (3) obtain alternative funding or substitute representation for clients when the lawyer must withdraw.¹¹

With respect to the notice provision to clients of impending changes, the Opinion states that the Model Rules require "a legal services lawyer to give *all* clients adequate notice of the impending changes . . . and how they may affect the clients' representations . . . whether the lawyer anticipates being able to continue the representation, . . . to limit the scope of the representation, to refer the matter to alternate counsel, or to withdraw"¹². Although Model Rules 1.4(a) and (b), which deal with communications with clients, require that a client be "reasonably informed about the status of a matter . . . to the extent reasonably necessary to enable the client to make informed decisions regarding the representation,"¹³ Model

8. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4. (1997)

9. *Id.* at Rule 5.4(c).

10. *See, e.g.*, Formal Op. 96-399, *supra* note 1.

11. *Id.* at 21.

12. *Id.* (emphasis added).

13. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4 (1997).

Rule 1.4 does not appear to require notice to clients who would not be affected at all by the funding reductions or by the potential restrictions on the scope of practice. The notice provisions in the Opinion thus appear overbroad, since many existing clients were unaffected by the restrictions. A more realistic practice would have been to give notice to clients who would be affected by the funding restrictions.

Interestingly, in determining priorities, the Opinion states that "legal services lawyers should consider the availability of alternative representation, any material adversity that will befall particular clients who are not served, and the particular problems faced by indigent people generally in each locality."¹⁴ The Opinion does go on to sound a cautionary note that "[c]onflict with the proposed funding restrictions . . . is not sufficient justification for abandoning existing clients."¹⁵ In obtaining alternative funding or representation, if an LSC attorney decides that withdrawal is necessary to preserve funding to serve other existing clients, the lawyer must do all the lawyer can to mitigate any material adverse effect on the client. Of course, finding competent alternative counsel is the most appealing way, but is not always workable. The Opinion did recognize that "[a] particularly difficult situation arises in the context of existing class actions, in which class certification is based in part upon evidence that counsel for the class will fairly and adequately represent the class."¹⁶

The Opinion expresses no opinion on what happens if leave to withdraw is sought and not granted, but states that "legal services lawyers have an ethical obligation to explore the boundaries of continuing representation of existing clients under the new funding scheme."¹⁷ The Opinion goes on to indicate that there may be an ethical obligation "to determine whether there is a basis for securing a different interpretation of restrictive legislative language" when seeking to withdraw before a court.¹⁸

What is the duty to assist clients whose representations are prohibited by the acceptance of LSC funding? The first consideration is the effect of staff reductions, and there you have to determine if the additional workload of the remaining lawyers affects their duty to provide competent representation. "Some legal services organi-

14. Formal Op. 96-399, *supra* note 1, at 22.

15. *Id.*

16. *Id.*

17. *Id.*

18. *See id.*

zations,” the Opinion goes on to say, “will be able to decline LSC funding, some will set up a separate organization, and alternative funding may be found.”¹⁹ Thus, the Opinion states again that “it would be incorrect to conclude that discontinuing representation of current clients is the only solution to these restrictions in every case.”²⁰

But what happens where, despite every effort to obtain substitute representation, a legal services attorney is presented with high-priority cases that violate funding restrictions? The legal services lawyer must balance obligations between existing clients who were formerly eligible with obligations to existing clients who will be hurt if the funding is lost. The Opinion states that “where the LSC is the sole source of funds, the choice is clear: in such a circumstance, the lawyer’s withdrawal from ineligible matters would be mandatory, since it would otherwise be impossible for the lawyer to fulfill her obligations to any clients,”²¹ thus violating the Model Rule regarding competence.

Where the legal services office relies on a variety of sources, including LSC funding, the decision is more difficult. Although the Opinion does acknowledge that the Model Rules provide little guidance when a lawyer must choose between two or more existing representations,²² when choosing to represent a client who is ineligible under the restrictions and the loss of LSC funds would not require withdrawal from all pending matters or the closing of the office, the decision remains with each LSC office to determine “whether the greater good is served by forgoing LSC funding and maintaining restricted representations - undoubtedly at the cost of some services - or by withdrawing from prohibited matters and preserving those aspects of the practice that comply with restrictions.”²³

The Opinion, however, makes no mention of the provision in Model Rule 1.16 governing withdrawal that states withdrawal may be mandatory when “required by law.”²⁴ The Opinion does not discuss how the requirements imposed by federal law relate to the Rules mandatory withdrawal provision when “required by law.” If continued representation in a case would require the attorney to

19. *Id.*, at 24.

20. *Id.*

21. *Id.* at 25.

22. *See id.*

23. *Id.*

24. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16 (1997).

violate the restrictions in federal legislation, could not the withdrawal be said to be "required by law?"

What are the legal services lawyers' obligations to remaining clients once the decision has been made to accept LSC funding and the accompanying practice restrictions? Again, the Opinion requires notification about the new restrictions to each remaining client, even if they do not seem to be an issue for that particular client.²⁵ The Opinion also requires legal service attorneys "to notify clients that circumstances, such as incarceration or a change in immigrant status, will likely make them ineligible for further legal services."²⁶ This notice requirement does not appear to flow from the text or commentary of Model Rule 1.4,²⁷ and there is no mention in the Opinion that it could have a potentially negative impact on the attorney-client relationship.

The Opinion does recognize difficult ethical issues arise if an existing client's case may require future advisable or necessary actions that would violate the LSC practice restrictions and states that a legal services lawyer who accepts LSC funding again should inform all clients of the accompanying practice restrictions and obtain their written agreement to abide by those restrictions, even if it does not appear likely that a particular representation will run afoul of those restrictions.²⁸

Model Rule 1.2, which permits limiting the scope of representation of a client if the client consents after consultation,²⁹ does not appear to suggest that the lawyers must give notice to obtain consent from a client when there is no practical likelihood that the restrictions on representation will affect that particular client. In addition, in discussing client consent, the Opinion did not address, with respect to current clients, whether it is realistic for a current client to give consent without it being inherently coercive.

Moreover, are all lawyers required to inform potential clients at the time of employment of all possible issues which might subsequently require the lawyer to withdraw? If not, should not legal services lawyers be required to seek client consent to the restrictions only in circumstances when the restrictions may reasonably be expected to affect their representation?

25. See Formal Op. 96-399, *supra* note 1, at 25.

26. *Id.* at 26.

27. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4 (1997).

28. See Formal Op. 96-399, *supra* note 1, at 27.

29. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 (1997).

The Opinion then goes on in a very brief section to discuss the ethical duties of legal services lawyers to future clients, recognizing that attorneys have more flexibility in accepting new clients than they do with existing ones, as far as placing limitations on the representation.³⁰ Although it is still necessary to secure client consent after fully explaining the implications, the attorney may decline the representation if the prospective client does not agree. If the lawyer determines that forgoing specific legal options would seriously compromise the duties to the client, the lawyer must decline representation.³¹

What about limiting the scope of representation for future clients? Legal services programs have limited the scope of representation and entered into limited retainer agreements in a variety of circumstances, for instance, in advice-only situations and in representations at trial, when we do not agree to take an appeal should we lose. However, with respect to new clients, could not new clients knowingly consent to a risk? Although the Opinion really focused on the requirement of withdrawal from present representations, as more times goes by, clearly the larger concern will be the impact of the restrictions prospectively.

The final section of the Opinion deals with mandated pre-litigation disclosures.³² As we learned this morning, since the federal law that was enacted is quite different from the provisions addressed in this section of the Opinion. I am going to skip over that section, only to state that the Opinion still has somewhat troubling language regarding a possible waiver of the attorney-client privilege.

I would like to conclude briefly by commenting that the Opinion implies, and even specifies, an ethical obligation to non-clients.³³ I think we may hear more about this by the other panelists. For example, the Opinion discusses setting priorities for existing clients, and then goes on to suggest that "there is an ethical obligation to consider material adversity that will befall particular clients who are not served and the particular problems faced by indigent people generally in each locality."³⁴ The Opinion also suggests that in deciding whether to continue to represent existing clients who become ineligible once beginning representation, the lawyer should

30. See Formal Op. 96-399, *supra* note 1, at 27-29.

31. See *id.* at 29.

32. See *id.* at 29-30.

33. See *id.* at 22.

34. *Id.*

take into account the interests of other clients who would go unrepresented if LSC funding is lost.³⁵

While it may be appropriate for the ABA in issuing standards for providers of civil legal services, or for the LSC in promulgating Regulations, to suggest priority-setting processes used by legal service programs to take into account the needs of future or potential clients, is there an ethical responsibility to potential clients that requires certain actions or procedures be undertaken by LSC recipients? Ethical responsibilities, with very few exceptions, flow generally to existing clients.

The Committee concludes by urging great care and caution as legal services attorneys "negotiate an ethical and legal mine field."³⁶ While the Committee calls on the legal profession as a whole, the Opinion points out that this crisis differs from past ones since "the profession cannot absolve itself of responsibility simply by writing a check to the local legal services office."³⁷ The Committee urges the legal community to participate in the *pro bono* representation of the indigent, to establish and support legal services organizations independent of LSC funding, and for the courts to ease the burden of appointing counsel. Finally the Opinion states that "[i]n the end, the only real solution is for this country to recognize the need to fully fund lawyers for the poor free from restrictions that hamper their ability to serve their clients."³⁸

For your information, subsequent to its issuance, the Opinion has been the subject of controversy within the legal services community itself and among some of its supporters. Requests to the ABA Ethics Committee to modify the Opinion after the legislation was passed have not been acted upon to date. There have been no substantive scholarly critiques of the Opinion. There have been no federal or state reported cases which cite to the Opinion. Only two state ethics opinions have issued opinions which basically adhere to the Opinion. They are Utah State Bar Committee Opinion 96-07³⁹ and State Bar of Michigan, Committee on Professional and Judicial Ethics Opinion R-1-252.⁴⁰

Perhaps the concluding paragraph of the Opinion may turn out to be the most valuable of all, for it raises the important institu-

35. *See id.* at 22.

36. *See id.* at 30.

37. *See id.* at 31.

38. *Id.*

39. *See* Utah State Bar Commission, Opinion 96-07 (1996).

40. *See* State Bar of Michigan, Commission on Professional and Judicial Ethics, Opinion R-1-252 (1996).

tional questions and broader issues as to: what is the role of the private bar in *pro bono* representation, recognizing that aspects of poverty law are indeed a specialty, like antitrust law; what is the role of the federal courts; state administrative law judges, and housing court judges in the appointment of *pro bono* counsel; what may be the role of bar associations and law school faculties; what are the resources that are needed to ensure competence, continuity, and a permanent stream of funding so that there is access to legal services programs; and who should be at the table in helping to shape the response on an emergency basis and in developing a long-term plan?

RUSSELL G. PEARCE:

Thank you, Helaine. Emily Sack.

EMILY J. SACK:

Thanks, Russ. I did want to mention that though I am on the Committee on Professional Responsibility and, as Eric Freedman mentioned at the last panel, I am working on a joint report with the Civil Rights Committee on the implications of the legal services restrictions, the views I am presenting today are my own.

In answer to Russ's question, I believe there has to be a response to these restrictions. And, with due respect to the ABA Opinion - and I recognize they may have been answering the question they were asked - I think it is really necessary to take an approach that's dramatically different than the ABA Opinion. The ABA Opinion focuses on individual legal services lawyers and tries to guide them in how to conform their conduct to live within the restrictions and adhere to the ethical rules.

The problem with this approach, as I see it, is that it ignores two very important contexts. First, it really doesn't address the larger issue of the broader impact of these restrictions on attorneys. I think that we need to focus not just on an individual attorney, but to address the legislation for what it is and its impact on basic principles of professional responsibility. As one of the panelists from the legal services community mentioned at an earlier panel this morning, this affects the profession as a whole. I don't think that the burden should be on the individual legal services lawyer to be faced with the individual ethical dilemma and have to make the response by himself or herself.

I'm going to go through in a minute some of the very basic principles of professional responsibility on which the restrictions have

an impact. But I want to say that if we don't respond in an active way, I think in some sense we are acquiescing to what is a generalized attack on legal services. So I think that it has to be general and it has to be by the community.

The second context which I think that the ABA Opinion basically — I was going to say ignores, but maybe just doesn't give enough credence to — and I believe one of my co-panelists is going to speak a little bit more about this — is the true availability of lawyers to do this work. It assumes a perfect world in which if a lawyer must make a choice to withdraw, there will always be another lawyer available, one who is qualified to handle the case. Again as the legal services panel spoke about earlier, in reality that's simply not the case.

The ABA Opinion talks about "balancing," whether it is worse to lose one client's representation or risk de-funding⁴¹ and what impact that will have on the multitude of remaining clients, but what that balancing really doesn't address is that either decision would result in a loss of representation to some client or set of clients. And if there is a withdrawal, the greatest likelihood is that no substituting attorney would be available. So I think we really need to look at these restrictions in the real world, where there is a lack of adequate legal services available to the poor, both in the *pro bono* community and among other public interest lawyers.

I will speak very briefly about some of the basic principles of professional responsibility, which I assume are pretty familiar to this audience. I will just state a couple that are really impacted by the legislation. The first is the responsibility of competent representation.⁴² The rule states that competent representation requires the thoroughness reasonably necessary for the representation. Comment 5 to Model Rule 1.1 states that competence includes "the use of methods and procedures meeting the standards of competent practitioners."⁴³ Where the standards of competent practitioners require that certain of these methods and procedures be used, the restrictions conflict with this Rule.

The second is the scope of representation under Model Rule 1.2, to which Helaine alluded, which delineates the right of the client to consult about the means to be used in achieving the objectives of the legal representation.⁴⁴ Comments 4 and 5 to Model Rule 1.2

41. See Formal Op. 96-399, *supra* note 1, at 18.

42. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1997).

43. *Id.* at Rule 1.1 cmt.

44. *Id.* at Rule 1.2.

state explicitly that while the scope of services provided by a lawyer may be limited by agreement with the client, an agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law.⁴⁵ Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1. The statute, of course, explicitly limits legal services lawyers' methods and objectives of representation.⁴⁶ However, where a particular method is necessary to competently represent a client, under the Model Rules, a legal services attorney cannot ask a client to forgo this method or objective, so that the statute places the attorney in direct conflict with the Model Rules.

The third basic principle is zealous representation despite obstruction or opposition. Model Rule 1.3 states that "a lawyer shall act with reasonable diligence in representing a client."⁴⁷ Comment 1 to the Rule explains this concept. It says:

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.⁴⁸

Zealous representation is related to another fundamental concept of professional responsibility which is affected by the legislation: the independence of professional judgment and the rejection of third-party interference. Canon 5, first of all, states "a lawyer should exercise independent professional judgment on behalf of a client."⁴⁹ This principle is articulated also in Model Rule 2.1: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice."⁵⁰ In addition, Model Rule 5.4(c) states:

A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.⁵¹

45. *Id.* at Rule 1.2 cmt. 4 & 5.

46. *See generally* 45 C.F.R. §§ 1602 - 1642 (1998).

47. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 (1997).

48. *Id.* at Rule 1.3 cmt. 1.

49. ABA CANONS OF PROFESSIONAL ETHICS Canon 5 (1970).

50. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 (1997).

51. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-21 (1995).

Section 5 of the Code's Ethical Considerations expands on the lawyer's duties in the face of potential interference by third parties. E.C. 5-21 states that:

The obligation of a lawyer to exercise professional judgment solely on behalf of his client requires that he disregard the desires of others that might impair his free judgment. The desires of a third person will seldom adversely affect a lawyer unless that person is in a position to exert strong economic, political, or social pressures upon the lawyer.⁵²

The legislation does subject the legal services lawyer to this kind of pressure.

There are other principles, but I think I'll stop there. I just want to raise two other points. One is that, also within the Model Rules, there is a broad principle of commitment of the profession to legal access for the poor. In the Preamble to the Model Rules, it states; The lawyer is a public citizen having special responsibility for the quality of justice, who should employ her knowledge in reform of the law.⁵³ The Model Rules state that "a lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, and should therefore devote professional time and civic influence in their behalf."⁵⁴ A lawyer should aid the legal profession in pursuing these objectives."⁵⁵

The other point I want to make, because I'm not sure it was mentioned at any point today, is that, when it established the Legal Services Corporation, Congress explicitly intended for its lawyers to be bound by professional responsibility obligations.⁵⁶ Within the statute is a reference to the Code of Professional Responsibility.

I just want to conclude by saying that, again, I believe we have to respond to the statute by looking at the broad view rather than at the individual attorneys' dilemma. That is not the spirit in which the restrictions were enacted, and it is not a statute that has another purpose with just an incidental impact on the individual lawyer. It's a purposeful attempt to limit the activities of a whole segment of the bar, and I think it deserves a broad response. We need to challenge the statute's validity. It is not just the individual

52. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4(c) (1997).

53. *Id.* at pmbl.

54. *Id.*

55. *Id.*

56. *See* 42 U.S.C. § 2996 (1994).

legal services attorneys' job, though they certainly have a right, and perhaps an obligation, to do so. But beyond that, we need to speak as a policy matter against these restrictions. The organized bar needs to make a policy response to these restrictions.

RUSSELL G. PEARCE:

Thank you, Emily. Steve Ellmann.

STEPHEN ELLMANN:⁵⁷

Both of the people who have spoken so far have mentioned Model Rule 5.4(c). I would like to belabor this point. The 5.4(c) issue — whether the Legal Services Corporation restrictions constitute an unacceptable interference in lawyer-client relationships by a third-party footing the bill for the representation — goes unaddressed in the ABA's Formal Opinion 96-399.⁵⁸ That opinion responds to the LSC restrictions not by determining whether these restrictions themselves are unacceptable but rather by examining how lawyers can comply with these restrictions without violating *other* ethical commands. The Formal Opinion's focus is important, but we should not assume that the LSC's restrictions are compatible with lawyers' professional duties.

As you've all heard, Rule 5.4(c) says that "[a] lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."⁵⁹ There is also another provision analogous to this one, Model Rule 1.8(f), which says that another person can compensate a lawyer for representing a client only if "(1) the client consents after consultation; [and] (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship."⁶⁰ These ideas are not new. On the contrary, Rule 5.4(c) is almost identical to DR 5-107(B) of the Model Code.⁶¹ Canon 35 of the

57. Professor of Law, New York Law School. I thank the Editors for the opportunity and time to revise these remarks, Nicole Krug for valuable research assistance, and Alan Houseman for the extensive information he provided on the LSC rules and the ABA's ethics opinion regarding them.

58. See Formal Op. 96-399, *supra* note 1.

59. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4(c) (1997).

60. *Id.* at Rule 1.8(f)(1)-(2). In addition, client confidentiality must be preserved. See *id.* at Rule 1.8(f)(3).

61. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-107(B) (1983).

ABA Canons of Professional Ethics, the predecessor to the Model Code, was to quite similar effect.⁶²

Several older cases confirm the importance attached to the prohibition on interference with professional judgment. The establishment of public interest and legal services groups has not always met with universal acclaim, and in a number of cases state courts were called upon to hold that these entities were in fact unlawful. One theory advanced to demonstrate their unlawfulness was that these bodies, which were organized as not-for-profit corporations, were in breach of laws prohibiting the practice of law by corporations. The answer given in some of these cases was roughly this: that these groups were not in breach of these laws provided that they did not constrain the independent professional judgment of the individual lawyer on behalf of his or her clients.⁶³

This logic suggests that if those corporations had been constraining their lawyers' professional judgment, then they would have been in breach of prohibitions on corporate practice of law — and they would have had to go out of existence. Similarly, if a legal services organization complies with the new federal restrictions, and if in doing so it interferes with its lawyers' professional judgment, then the organization itself may be jeopardizing its right to exist in any state where such prohibitions still exist.⁶⁴ More important, these cases underline the importance of the principle that law-

62. The first paragraph of Canon 35 of the ABA CANONS OF PROFESSIONAL ETHICS (as amended through 1970) reads:

The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer. A lawyer's responsibilities and qualifications are individual. He should avoid all relations which direct the performance of his duties by or in the interest of such intermediary. A lawyer's relation to his client should be personal, and the responsibility should be direct to the client. Charitable societies rendering aid to the indigents are not deemed such intermediaries.

ABA CANONS OF PROFESSIONAL ETHICS Canon 35 (1970).

63. See *Azzarello v. Legal Aid Society*, 185 N.E.2d 566, 570 (Ohio Ct. App. 1962); *Touchy v. Houston Legal Foundation*, 432 S.W.2d 690, 695 (Tex. 1968). Cf. *Application of Community Action for Legal Services, Inc.*, 274 N.Y.S.2d 779, 787 (N.Y. App. Div. 1st Dept. 1966) (refusing to approve incorporation certificates for proposed legal services groups in part because "the lawyer operations would be subject ultimately to lay control"). Recently, the New Jersey Supreme Court has twice found that corporations delivering legal services were engaged in the practice of law, but allowed them to continue doing so in part because the lawyers in these organizations were exercising unfettered professional judgment. In *re 1115 Legal Service Care*, 541 A.2d 673 (N.J. 1988) (involving prepaid legal services); In the *Matter of Education Law Center, Inc.*, 429 A.2d 1051 (N.J. 1981) (involving public interest law).

64. New York, as it happens, no longer has such a prohibition on the corporate practice of law, and in an era of "professional corporations" probably few states do.

yers' judgment must not be constrained by third parties, even those who pay the bills.

Despite the existence of these cases, and despite the firm language of the ethics codes, it is not self-evident that they actually apply to the problem we are discussing today, and so I want to spend a little time examining whether, and why, Model Rule 5.4(c) (and DR 5-107(B)) do actually bear on this situation.

Model Rule 5.4(c) says, again, that "[a] lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."⁶⁵ This command clearly does not mean that if you are hired by lawyer *X* as her subordinate lawyer, lawyer *X* cannot tell you what to do in a case. Lawyer *X* can do this; subordinates not only should follow their lawyer-supervisors' directions, but they are even absolved of ethical violation where they "act[] in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty."⁶⁶

Now it might be said that all the limits that the individual legal services lawyer is under are imposed by that lawyer's supervisors — other lawyers — and so it might be argued that no non-lawyer is regulating anybody's professional judgment. But this argument blinks reality. The supervisory lawyer in a legal services office is not the "employer or payer." Instead, that supervisor is also an employee of the entity, the not-for-profit corporation organized to provide legal services through these various employees, and the supervisor enforces the Legal Services Corporation restrictions because the entity decides that it will adhere to them. Of course this corporation is not a natural person, but it seems to me no stretch at all to understand the word "person" in Rule 5.4(c) to include artificial persons, such as legal services corporations. When the board of a legal services entity votes to continue to receive Legal Service Corporation funds and to adhere to the Legal Service Corporation's limits, then if those limits constitute restrictions on the lawyers' professional judgment on behalf of clients, the entity must be seen as the "person" that imposed them.⁶⁷

65. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4(c) (1997).

66. *Id.* at Rule 5.2(b).

67. It might be argued that as long as the entity's decisions about legal services are made by lawyers — for example, as the members of the organization's governing board — these decisions do not constitute third-party *non-lawyer* intervention into attorney-client relationships. Some courts have insisted that all decisions about which cases to accept and how to handle them "must be made by lawyers, either employed

So are the LSC limits actually restrictions on a lawyer's professional judgment on behalf of clients? My answer is that some are not, but some are. As I understood Steven Shapiro did earlier today, I would differentiate between classes of restrictions. In particular, it seems to me that it is not a restriction on a lawyer's professional judgment in serving a client to restrict his or her choice of which clients to serve. The 5.4(c) problems only become acute when the restrictions deal not with who can be taken as a client, but what can be done on the client's behalf. When, however, the lawyer is told by the person who pays or employs her that she cannot use her independent professional judgment on a case that she is now handling, then 5.4(c) has been breached. Moreover, I would argue that the constraint on the lawyer's judgment need not be so intense as to make her work incompetent and a violation of Rule 1.1.⁶⁸ The lawyer may be doing the best she can, and her best may be competent — but if she has been forbidden to consider possibilities that she otherwise might have chosen, in the exercise of her independent professional judgment, then Rule 5.4(c), read according to its terms, has been violated. And surely it is clear that where a lawyer cannot challenge welfare reform policy, or cannot bring a class action, or cannot initiate legislative advocacy, or cannot seek attorneys' fees, her independent professional judgment has indeed been regulated.⁶⁹

by the organization or members of its board, who are fully cognizant of governing professional standards and who are responsible to this Court for maintenance of those standards." In the Matter of Education Law Center, Inc., 429 A.2d 1051, 1058 (N.J. 1981); see also Application of Community Action for Legal Services, Inc., 274 N.Y.S.2d 779, 787 (N.Y. App. Div. 1st Dept. 1966) (requiring that "the executive staff, and those with the responsibility to hire and discharge staff from the top to the lowest lay echelon must be lawyers"). But even if this logic supports characterizing the legal services agency boards' decisions as supervisory-lawyer decisions rather than third-party-payer interventions, the Rule 5.4(c) problem might not go away. We would then have to recognize that the Legal Services Corporation, or ultimately the United States government, are akin to third-party-payor "persons" who are intervening in the decisions of the legal services agency boards, as well as ultimately in the decisions of individual legal services lawyers.

68. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1997) ("A Lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."). For a discussion of the circumstances in which limits on the lawyer's exercise of judgment would breach Rule 1.1, see *infra* note 91 and accompanying text.

69. Each of the limitations referred to in the text has in fact been imposed, albeit often with some qualifications. Alan Houseman details the restrictions imposed on lawyers who receive LSC funding in an extremely helpful article. See Alan W. Houseman, *Legal Representation and Advocacy Under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, 30 CLEARINGHOUSE REV. 932 (1997). He

If this reading of Rule 5.4(c) is correct, what follows is that the lawyers who endure such restrictions are in breach of 5.4(c). So, presumably, one would have to say that lawyers at entities that are imposing such restrictions on the lawyers had better leave those entities, because as long as they stay, they would appear to be in breach of 5.4(c).

Now, one could respond here, "Well, can't these unfortunate lawyers avoid being in breach of 5.4(c) by simply not taking any of the cases where their professional judgment might wind up getting restricted?" Through this strategy, the lawyers could avoid having restrictions on their handling of cases imposed on them by narrowing their caseload to those cases in which their employers have no intention of imposing any restrictions. I have to acknowledge that it is probably possible to view every restriction on what you can do for a client as simply a restriction on which clients you can take. That is, you can only take "clients for whom you won't do X, Y, and Z."

But I would resist the argument that lawyers can escape the 5.4(c) problem in this fashion. I do so for two reasons. First, and most fundamentally, lawyers can't altogether predict which cases will later call for them to exercise professional judgment that they're not allowed to exercise. As a result, it seems inevitable that they will sometimes find themselves actually representing clients for whom, absent the legal services funding rules, they might want to consider and then might choose to adopt one or more of the strategies that they are obliged not to choose.

Second, the range of cases in which these strategies might be worth professional consideration seems wide enough that lawyers who actually excluded all of them in advance would likely fall into other breaches of professional duty.⁷⁰ While these breaches might

writes that "[r]ecipients of LSC funds may not initiate legal representation or challenge laws . . . enacted as part of a reform of a federal or state welfare system," *id.* at 940, although this prohibition does not bar all challenges to welfare policies or prevent advocacy for individual claimants affected by welfare reform law provided the representation does not "challenge existing statutory law." *Id.* at 941. He also explains that "LSC-fund recipients may not initiate or participate in class action litigation." *Id.* at 942. There are also sharp, though not total, restrictions on legislative advocacy. *See id.* at 943-47. Finally, in many, though not all, cases "LSC-fund recipients may not claim or collect and retain attorney fees." *Id.* at 943 n.49. For the statutory basis of the new restrictions, see Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. 104-134, § 504, 110 Stat. 1321; Omnibus Consolidated Appropriations Act, 1997, Pub. L. 104-208, § 502, 110 Stat. 3009.

70. It is somewhat unclear just how great the impact of these restrictions will be. The plaintiffs in a case challenging the restrictions have contended that "Legal Services lawyers representing indigent clients in over 600 class actions nationwide have

not themselves be potential grounds for discipline, they would be improper nonetheless, and the prospect of such problems weighs against accepting any "solution" to the 5.4(c) problem that generates these other difficulties. One such breach of duty would be a violation of the lawyers', or more precisely their employers', statutory obligation to work out priorities for service that respond to client need.⁷¹ In addition, I think that lawyers who so circumscribed their practice would be violating — or at least they would be in tension with — their and our duty under Rule 6.1 to make legal services available to those who really need them.⁷² Rule 6.1, to be sure, is not an enforceable command, but it remains a part of professional obligation.⁷³

been forced to resign as class counsel, or have been forced to assume 'non-adversary' monitoring status." Memorandum of Law in Support of Motion for Preliminary Injunction at 7, *Velazquez v. Legal Services Corporation*, No. 97 Civ. 00182 (FB) (E.D.N.Y. Jan. 27, 1997). In contrast, Alan Houseman believes that "over 90 percent of the work done in legal services in 1995 could continue, and over 95 percent of the cases brought to court in 1995 could be brought." Houseman, *supra* note 69, at 939 n.27. Houseman is an experienced observer, and his estimates may well be correct.

The remaining 5 to 10 percent, however, contain some very important work, as the *Velazquez* plaintiffs argue and as Houseman himself recognizes, Houseman, *supra* note 69, at 939 n.27. Moreover, although the new rules extensively restrict what LSC fund recipients can do even with non-LSC funds, there have been restrictions on the use of LSC funds for many years. See 42 U.S.C. §§ 2996f(a)(5), 2996f(b) (1997) (containing restrictions as amended in 1977). As a result, the baseline against which Houseman measures the impact of the new rules may itself be tainted by the impact of third-party-payor restrictions that might not stand scrutiny under Rule 5.4(c). Finally, once we recognize that Rule 5.4(c) is violated not only when lawyers are unable to undertake a particular course of action but also when they are precluded by a third-party payor from considering it in a case where such consideration would be appropriate, I suspect the percentage of affected cases will expand.

71. See 42 U.S.C. § 2996f(a)(2)(C) (1997). The United States Code requires the Legal Services Corporation to:

insure that . . . recipients . . . adopt procedures for determining and implementing priorities for the provision of such assistance, taking into account the relative needs of eligible clients for such assistance . . . , including particularly the needs for service on the part of significant segments of the population of eligible clients with special difficulties of access to legal services or special legal problems (including elderly and handicapped individuals).

Id.

72. "Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer." MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 cmt. (1997).

73. Rule 6.1 urges lawyers to "aspire to render at least (50) hours of pro bono publico legal services per year" and to "voluntarily contribute financial support for organizations that provide legal services to persons of limited means." *Id.* at Rule 6.1. The final section of the commentary accompanying Rule 6.1, however, tells us that "[t]he responsibility set forth in this Rule is not intended to be enforced through disciplinary process." *Id.* at Rule 6.1 cmt.

So I would reject the idea that one could get out of the 5.4(c) box by ruthlessly limiting one's case load. If what I have argued so far is right, then 5.4(c) and its counterpart provision in the Model Code are breached by the Legal Services Corporation restrictions and lawyers at entities that are applying those restrictions are in breach of these rules.

Moreover, it is a particularly striking feature of Rule 5.4(c) and DR 5-107(B) that neither of them contains language permitting a client to consent to a departure from its provisions. Clients, in other words, are not permitted to allow third parties to regulate their lawyer's professional judgment. Using the language of conflicts discussions, we might say that the Rules and Code view this kind of conflict as "unconsentable."

In his presentation, however, Professor Stephen Gillers rightly pointed out an important qualification of this proposition. Although clients cannot consent to third-party limitations on their lawyers once the representation is underway, they apparently *can* agree to such limitations at the onset of the matter.⁷⁴ In particular, the comment to Model Rule 1.2 declares that "[r]epresentation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles. When a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters related to the insurance coverage."⁷⁵ Assuming that clients may also agree, under Rule 1.2, to limitations on the means their lawyers will use — as the comment, though not the Rule, declares⁷⁶ — they presumably could agree at the onset to the kinds of limits required by the LSC, unless those limits are for some other reason not in "accord with the Rules of Professional Conduct and other law."⁷⁷

74. See *infra* pp. 388-92 (remarks of Stephen Gillers).

75. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 cmt. (1997).

76. The Rule says that "[a] lawyer may limit the objectives of the representation if the client consents after consultation." *Id.* at Rule 1.2(c). The relevant section of the Comment, however, is entitled "Services Limited in Objectives or Means." Perhaps this apparent inconsistency reflects the Rules' recognition that "[a] clear distinction between objectives and means sometimes cannot be drawn," *id.* at Rule 1.2 cmt., as well as a sense that limitations on objectives are actually greater potential intrusions on client choice than limitations on means.

77. The comment to Rule 1.2 directs that "[a]n agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law." *Id.*

Before we explore whether these limits are somehow beyond the scope of what clients could agree to under Rule 1.2 at the onset,⁷⁸ we must recognize that this solution does not offer an easy out for lawyers who now must limit the means they will utilize on cases that are already ongoing.⁷⁹ For these lawyers and clients, Rule 1.2 offers no solace unless, as Professor Gillers suggested, they can re-start their attorney-client relationships, include the new restrictions in the terms of the newly-begun relationships, and thus avoid ever having to impose these restrictions in an ongoing relationship. While this may well be the least untenable course of action available to lawyers in this difficult position, as Professor Gillers suggests, its fictional character seems clear. The relationship *is* ongoing, in all but name, and if Rule 5.4(c) really prohibits third-party intrusions on ongoing attorney-client relationships then we ought not to allow it to be circumvented in this way.

At least for the many current cases in which lawyers might have given real consideration to any of the steps now precluded by the LSC rules, accordingly, Rule 5.4(c) appears to constitute an unwaivable problem. The upshot of this analysis would be that lawyers complying with the LSC restrictions would be obliged to withdraw not only from those cases in which they would have had to use the now-barred approaches in order to provide competent representation, but also wherever they would have otherwise considered these approaches as among the options to be weighed and adopted, or rejected, in the exercise of independent professional judgment.⁸⁰

All of this, however, has assumed that the words of Rule 5.4(c) and DR 5-107(B) are as unqualified as they appear. In fact, however, it is clear that in at least three contexts third parties do exercise significant control over the steps that lawyers take on their

78. See *infra* text accompanying notes 89-100 (discussing the permissibility of the LSC restrictions under the *Restatement of the Law Governing Lawyers*) and *infra* note 91 (analyzing the application of Rule 1.2).

79. Scott Rosenberg of the Legal Aid Society of New York pointed out this problem in a question he posed during the panel discussion.

80. If Rule 5.4(c) is an absolute prohibition on third-party control of the lawyer's independent judgment, then the lawyer would be obliged to withdraw whenever such control would otherwise be felt, since withdrawal is ordinarily mandatory when "the representation will result in violation of the rules of professional conduct." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(a)(1) (1997). Withdrawing from an ongoing case because of a third-party-payor's insistence, however, might itself constitute an impermissible acceptance of third-party control over the lawyer's rendition of legal services—so even withdrawal might not solve the 5.4(c) problem.

clients' behalf.⁸¹ The first of these is public interest litigation, in which, as is well known, advocacy organizations frequently determine that they will only press cases if the clients agree to seek particular objectives.⁸² The second is insurance defense. Here, by virtue of the insurance contract between the insurer and the insured, the insurer usually has the duty to provide a defense and at least considerable power to control it. The exact dimensions of this insurer power can be debated, but there seems to be no doubt that insurers routinely regulate at least some aspects of the decision-making of their insured's counsel.⁸³ The third, the most directly relevant here, is poverty law practice, in which budget limitations have generated caseloads that must require lawyers to make careful choices about what resources to expend on which cases.⁸⁴

Given these realities, it is difficult to read the words of Rule 5.4(c) and DR 5-107(B) as meaning exactly what they say. Such realities appear to have contributed to the decision of the drafters of the *Restatement of the Law Governing Lawyers* to make some inroads into what the Rules and Code seem to declare without qualification. In language not yet approved by the full American

81. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 215 cmt. & reporter's note (Proposed Final Draft No. 1 Mar. 29, 1996) [hereinafter RESTATEMENT].

82. See NAACP v. Button, 371 U.S. 415, 419-21 (1963).

83. See ROBERT E. KEETON & ALAN I. WIDISS, INSURANCE LAW: A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES, AND COMMERCIAL PRACTICES § 9.1(b) at 988 (Student Ed. 1988); Robert E. O'Malley, *Ethics Principles for the Insurer, the Insured, and Defense Counsel: The Eternal Triangle Reformed*, 66 TUL. L. REV. 511, 520-21 (1991); Charles Silver, *Does Insurance Defense Counsel Represent the Company or the Insured?*, 72 TEX. L. REV. 1583, 1594-95 (1994).

One important limit on insurer control may arise where the insurer disputes whether the underlying lawsuit falls within the scope of the insurance policy. Keeton and Widiss comment:

Although this issue has not been considered by the courts of most states, the judicial decisions in several states (including California, Illinois, and New York) provide unqualified holdings on this question. The conclusion of the Illinois Supreme Court is very representative of these opinions: absent the acceptance by the insured of the defense rendered by insurer after a full disclosure of a conflict of interest or the waiver of the defense by the insurer, an insured "has the right to be defended in the personal injury case by an attorney of his own choice who shall have the right to control the conduct of the case."

KEETON & WIDISS, *supra*, § 7.6 at 853-55 (footnote omitted) (quoting Maryland Casualty v. Peppers, 355 N.E.2d 24, 31 (1976)).

84. Paul Tremblay has insightfully discussed this aspect of legal services work in Paul R. Tremblay, *Toward a Community - Based Ethics for Legal Services Practice*, 37 UCLA L. REV. 1101 (1990).

Law Institute, section 215(2) of the 1996 Proposed Final Draft provides that:

A lawyer's professional conduct on behalf of a client may be directed by someone other than the client when:

(a) the direction is reasonable in scope and character, such as by reflecting obligations borne by the person directing the lawyer; and

(b) the client consents to the direction under the limitations and conditions provided in § 202 [which deals with consent to conflicts of interest].⁸⁵

85. RESTATEMENT, *supra* note 81, at § 215(2). This section of the Restatement has proved quite controversial, primarily, it seems, because of its bearing on insurance defense. See Nancy J. Moore, *Restating the Law of Lawyer Conflicts*, 10 GEO. J. LEGAL ETHICS 541, 568-68 (1997); Thomas D. Morgan, *Conflicts of Interest in the Restatement: Comments on Professor Moore's Paper*, 10 GEO. J. LEGAL ETHICS 575, 577-78 (1997). As a result, section 215, although part of the 1996 "Proposed Final Draft No. 1," has not yet been approved by the ALI. Professor Morgan writes that: [w]hen the Reporters submitted a revision of section 215 that had been worked out in discussions with the critics, the process had become so confused that the whole question was sent back for further review and consultation with the Projects Advisers and others.

Id. at 578. For further detail on this controversy, see David R. Anderson, *Ten Years Later, the Restatement's Attempt to Define Defense Counsel's Role in the Tripartite Relationship Is Still a Work in Progress*, MEALEY'S LITIG. REP.: INS, Oct. 15, 1996, available in LEXIS.

The American Law Institute has just published a revised version of Section 215 and its accompanying commentary. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 215 (Proposed Final Draft No. 2 Apr. 6, 1998) (I am grateful to John Leubsdorf for providing me with a copy.). The revised draft does not change the text of Section 215 itself, but does extensively revise the accompanying commentary. Not surprisingly, most of the proposed changes appear to respond to the special problems posed by insurance defense. In aggregate, these changes may somewhat enhance the authority of insurers vis-à-vis their insureds, but this modification does not seem meant to apply generally in all third-party-payor contexts. Instead, the commentary now declares at one point:

Certain practices of designated insurance defense counsel have become customary and, in any event, involve primarily standardized protection afforded by a regulated entity in recurring situations. Thus a particular practice permissible for counsel representing an insured may not be permissible under this Section in non-insurance arrangements with significantly different characteristics.

Id., cmt. f.

In one respect, however, the revisions are more directly relevant to the issue I am exploring here. The commentary to section 215 now speaks more extensively to issues of legal services practice that it did before. At one point the commentary observes that "other law [besides the law of lawyering] may govern" attorney-client relationships in this context, *id.*, cmt. a — and thus may permit what the law of lawyering would forbid. A new, final comment, however, describes a range of "legal service and similarly funded representation[s]," and ends with the observation that:

Regardless of the method of appointment, the form of compensation or the nature of the paying organization (for example, whether governmental or

It could certainly be argued that under section 215(2) the entire third-party control problem disappears. The directions imposed by the legal services agencies could be defended as “reasonable in scope and character” in light of the obligations imposed on the agencies by Congress itself. Moreover, clients surely would consent, since they have little alternative, and such constrained choice might be acceptable. Section 202 of the Restatement, which defines the conditions for consent, requires that the consent be informed, and this means “that the client . . . [must] have reasonably adequate information about the material risks,”⁸⁶ but this requirement could be satisfied through careful counseling. Once this requirement is met, any conflict can be consented to unless the representation is prohibited by law, or would involve clients of the same lawyer making claims against each other in the same case, or where “in the circumstances, it is not reasonably likely that the lawyer will be able to provide adequate representation to one or more of the clients.”⁸⁷ Finally, the Restatement would allow such consent to be given even after the lawyer-client relationship has begun, although it treats mid-stream adjustments more cautiously than agreements made at the start of the relationship.⁸⁸

The Restatement is not law, but it is certainly influential. Moreover, as I’ve already indicated, the Restatement’s denial of the absolute character of the prohibition on third-party interference with professional judgment is actually correct. This prohibition, though phrased in Rule 5.4(c) and DR 5-107(B) as if it were absolute, is already not so in fact. But if it is not absolute, that doesn’t mean that it is completely subject to invasion. Frankly, I am concerned that the Restatement’s authorization of third-party interference that is “reasonable in scope and character” may unwisely broaden the current departures from the rule prohibiting such interference into what would be, essentially, the elimination of the rule itself. But whether or not that is so, even the Restatement by no means authorizes any and all third-party control.

private or whether non-profit or for-profit), the lawyer’s representation of and relationship with the individual client must proceed as provided for in this Section [215].

Id., cmt. g. This declaration strongly supports the conclusion that the LSC restrictions, if they *are* inconsistent with Section 215, are inconsistent with the law of lawyering, and can be validated, if at all, only by reference to other law that displaces the rules of the Restatement.

86. *Id.* at § 202(1).

87. *Id.* at § 202(2).

88. *See id.* at § 29A & cmt. e.

On the contrary, it seems to me that it is quite appropriate to maintain that the third-party limits created by the LSC restrictions are not "reasonable in scope and character."⁸⁹ First, restrictions in other contexts, such as insurance defense or budget-conscious legal services practice, are at least to some extent arrived at on a case-by-case basis, reflecting professional judgment and sometimes client input in the particular case.⁹⁰ Here, by contrast, the restrictions imposed are uniform and across-the-board, and hence less likely to be reasonable in the circumstances of individual cases. Moreover, these restrictions block lawyers from even considering the prohibited steps in particular cases, and this across-the-board restriction on professional judgment undercuts lawyer representation in any case where competent practice would require *consideration* of these steps.⁹¹

89. It may be that much of the original force behind the organized bar's opposition to third-party regulation came from lawyers' self-interested resistance to discount legal services that might have been made possible through such mechanisms as legal services insurance. This might go far to explain why Canon 35 of the old Canons of Professional Ethics, quoted in note 62, *supra*, explicitly exempts "[c]haritable societies rendering aid to the indigents" from its prohibition on third-party "intermediaries." The resistance to discount legal services has now largely been overridden, and in my opinion rightly so. See, e.g., *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967). Nevertheless, as I seek to show in the text, there remain cogent reasons for taking the limit on third-party intervention seriously.

90. So, for example, the RESTATEMENT offers the example of an insurance lawyer who:

believes that doubling the number of depositions taken, at a cost of \$5,000, would somewhat increase Policyholder's chances of prevailing and Lawyer so informs Insurer and Policyholder. If the insurance contract confers authority on Insurer to make such decisions about expense of defense, and Lawyer reasonably believes that the additional depositions can be foregone without violating the standard of care owed by Lawyer to Policyholder . . . , Lawyer may comply with Insurer's direction that taking depositions would not be worth the cost.

RESTATEMENT, *supra* note 81, at § 215 cmt. f.

91. "Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 cmt. (1997). Thus restrictions preventing lawyers from making a proper analysis of a case and the options for pursuing it at least jeopardize competence even where the result of such an analysis might be to reject the very steps the lawyer is now prohibited from considering. Under Rule 1.2, therefore, it would appear that a lawyer should not be able to ask a client to agree in advance to the lawyer's not even considering an approach to the case unless a competent lawyer would not feel such consideration was called for. There may be many cases where options can be so confidently ruled out at the start, but there are likely to be others where they cannot be—and in these cases, as well as in those where analysis would ultimately indicate that the excluded options actually should be utilized, Rule 1.2 agreements to limit representation would seem to be questionable.

Second, what appear to be the paradigm cases of acceptable third-party intervention today all embody at least a substantial commonality of interest between the third party and the lawyer's actual client. The insurer and insured have contracted together, and typically share an interest in winning the case — and where their interests diverge, as in cases where the insurer maintains that the claim doesn't fall within the policy coverage, additional safeguards may be imposed to protect the insured.⁹² Similarly, the legal services agency ordinarily can be expected to desire the same success that the legal services client seeks.⁹³ So, too, in public interest law practice, where the advocacy organization funding the case undoubtedly does have a political agenda, the client may well share it.⁹⁴ Even so, there surely are examples, in each of these contexts, where client and third-party interests diverge, and it is because of this potential that there is reason for concern about third-party control even in these settings.

But the restrictions imposed now on LSC grant recipients are being imposed by the federal government, and the United States is likely to be the *adversary* in many of the cases whose handling it is now regulating, and the funder and ally of the adversaries (state and local governments) in many others.⁹⁵ Efforts by the United States to free its own attorneys of ordinarily-applicable ethical restrictions are currently controversial.⁹⁶ Surely it is at least as prob-

92. See *supra* note 83.

93. As in the insurance context, however, this identity of interest is not absolute. Paul Tremblay discusses the problem of "reconciling the interests, needs, and desires of individuals with those of the community of clients that the organization serves." See Tremblay, *supra* note 84, at 1124-29.

94. For the Supreme Court's perception of identity of interests between the NAACP and black litigants challenging school segregation, see *NAACP v. Button*, 371 U.S. 415, 443 (1963); for a much more skeptical appraisal, see Derrick Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

95. In particular, in the words of the *Velazquez* plaintiffs:

To make matters worse, these restrictions were enacted by the same Congress that engineered the most fundamental restructuring of welfare in its 60-year history, leaving 50 states to overhaul their welfare programs in the coming months, without the input of Legal Services lawyers representing indigent clients, leaving many poor people at the mercy of potentially unconstitutional, illegal and unwise regulations.

Memorandum of Law in Support of Motion for Preliminary Injunction at 8, *Velazquez v. Legal Services Corporation*, No. 97 Civ. 00182 (FB) (E.D.N.Y. Jan. 27, 1997).

96. See Mark Curriden, *Is DOJ Above the Rules? The Department's Bid to Exempt Lawyers from Contact Rule Is Blasted by States' Chief Justices*, ABA J., Nov. 1997, at 26.

lematic for the government to impose new restrictions on the practice of the attorneys for its opponents.

No doubt some defenders of these rules would maintain that they are being instituted in order to protect legal services clients from the interfering political agendas of their lawyers and those lawyers' employers. Clearly, one client's (or politician's) interference may be another's vindication. Moreover, there is no doubt that the poverty and disadvantage that legal services clients endure can make them more vulnerable to lawyers' exploitation. But I find it implausible to think that legal services lawyers, bound by professional duty and likely political orientation to serve poor clients, would be more likely to distort their clients' needs than would legislators who have no ethical obligation to put these citizens (and non-citizens) first — to say nothing of those legislators' politics.⁹⁷

Moreover, and more fundamentally, it seems to me that the preservation of an independent bar is threatened when the professional judgment of particular groups of unpopular lawyers — such as those representing the poor — is subjected to restrictions imposed as a result of political decisions by the state. It is especially troubling to see such restrictions imposed in the face of the long-standing, and far from adequately implemented, duty of all lawyers to ensure that even those without funds still have access to the legal system.⁹⁸ And it is difficult indeed to see the current restrictions as protecting the interests of legal services clients as those clients would define them, since one effect of these restrictions is to block lawyers from challenging policies that many or most of these clients surely see as harmful to them.⁹⁹

Even if these restrictions were "reasonable in scope and character," they would not be valid under the Restatement unless they were also validly consented to. The Restatement commentary indicates that valid consent must also be voluntary consent. In particular,

the lawyer must show that the client was not pressured to accede in order to avoid the problems of changing counsel, alienating

97. For examples of the explicitly political flavor of congressional opposition to the work of the Legal Services Corporation, see *Varshavsky v. Perales*, No. 40767/91, slip op. at 15 & n.2 (N.Y. Sup. Ct. Dec. 24, 1996). Among the comments quoted here is the observation by Representative Dornan that "[i]t's time to defund the left . . .," Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1997, 142 CONG. REC. H8149-04, at *185 (1997).

98. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (1997); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-25 (1983).

99. See *supra* notes 69, 94.

the lawyer, missing a deadline or losing a significant opportunity in the matter, or because a new lawyer would have to repeat significant work for which the client owed or had paid the first lawyer.¹⁰⁰

While this observation addresses mid-stream agreements, and does not focus on the situation of legal services clients who face the prospect of having no lawyer at all, rather than just of having problems in finding another, there is very good reason to question the voluntariness of the consent that legal services clients would give. These clients, or would-be clients, not only have little hope of finding other counsel, but they also frequently have acute legal needs. When the only possible source of aid in dealing with those needs comes complete with burdensome restrictions, consent to those restrictions hardly seems fully voluntary.

I've arrived at the conclusions that at least a substantial number of legal services lawyers are in breach of their ethical obligations by virtue of staying at jobs with LSC-funded entities, and that perhaps a number of those entities are in breach of their statutory program obligations as well — none of which is any good for the clients of legal services at all. It is not my object to close down legal services offices, or to force the employees of those offices to abandon their valuable work or face bar discipline.¹⁰¹

What I do hope is that this set of propositions is of value in the effort to overturn these restrictions. The demonstration that a longstanding, and still important, principle of legal ethics is being breached or at least compromised may help to persuade

100. RESTATEMENT, *supra* note 81, at § 29A cmt. e.

101. Professor Vanessa Merton asked during the panel discussion whether my arguments would oblige other lawyers to report their legal services colleagues to the bar for violation of the ethics codes. My answer then, and now, is “no”: however persuasive the arguments I advance here, I do not think lawyers could currently be said to “know” that practice under the LSC restrictions constitutes a violation of the rules. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3(a) (1997) (imposing reporting obligation on lawyers “having knowledge” of certain violations); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103(A) (1995) (imposing reporting obligation on lawyers “possessing unprivileged knowledge” of violations). Nor do I believe that such violations, if we “knew” of them, would “raise[] a substantial question as to [the violating] lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects,” as Rule 8.3(a) also requires. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3(a) (1997). Finally, I should add that since the meaning of Rule 5.4(c) is surely “arguable,” legal services lawyers who carry on their work “in accordance with a supervisory lawyer’s reasonable resolution” of the Rule 5.4(c) problem would be protected from discipline under Rule 5.2(b), *id.* at Rule 5.2(b) — even if the supervisors are ultimately mistaken in denying that they, and their subordinates, are being subjected to a 5.4(c) violation.

lawmakers, including those who rule on issues of ethics as well as those who draft statutes, to reject these restrictions. This recognition may also help to demonstrate the unconstitutionality of these restrictions, by buttressing the proposition that the LSC requirements undercut fundamental aspects of the notion of access to law. Finally, these propositions may help to increase the force of arguments, based on legal ethics, that aim to persuade the rest of the bar and the judiciary to shoulder an obligation to establish settings within which lawyers for the poor can practice as they should.¹⁰²

Finally, I cannot resist making an argument derived from what I have learned in another part of my academic life, in studying South African law and especially South African law of the days of apartheid. Sadly, this experience is not irrelevant to thinking about ways of challenging and limiting unjust laws in this country. One of the leading anti-apartheid legal scholars of the 1980s, the late Etienne Mureinik, articulated the idea that legislators should be held to their stated promises.¹⁰³ They should be imputed with, and bound by, an interpretive presumption of integrity. Interestingly, even the massively unjust legislation of the old South Africa did not rule out discerning certain benign legislative promises by which to temper injustice. In the United States, happily, our statutes probably contain many more such affirmations.

As Emily Sack indicated, one such promise — a promise repeated in numerous places in the Legal Services statutes — is that there shall be no interference with independent professional judgment on the part of legal services lawyers.¹⁰⁴ If that language is held to mean what it says, as a matter of integrity, and if these restrictions read without qualification constitute such interference for the reasons I've argued, then it would follow that the statutory provisions imposing these restrictions have to be quite brutally re-

102. The ABA Commission on Ethics and Professional Responsibility declared in Formal Op. 96-399, *supra* note 1, that:

Legal services organizations not funded by the Legal Services Corporation must be supported where they exist, and established where they do not. Our courts must stand ready to assign substitute counsel to the thousands of indigent clients who may find themselves without a lawyer. And lawyers throughout the nation must be prepared to give meaning to the principles of Model Rule 6.1 and perform extraordinary pro bono service

103. As he wrote, "if there is a discrepancy between our protestations and our actions, others have a right to bridge the discrepancy and hold us to what we affirm." Etienne Mureinik, *Pursuing Principle: The Appellate Division and Review Under the State of Emergency*, 5 S. AFR. J. HUM. RTS. 60, 67 (1989).

104. See 42 U.S.C. §§ 2996(5), 2996(6), 2996e(b)(3), 2996f(a)(1) & 2996f(a)(10) (1997).

interpreted so as to make an exception for those instances of conduct otherwise violating the statute which are necessitated by fidelity to the lawyers' ethical obligations. Much as a prominent South African statute ousting the courts' jurisdiction to review detentions without trial was interpreted to oust the courts' authority only when the detentions in fact complied with the statute,¹⁰⁵ so we might call for reading the Legal Services Corporation restrictions to constrain lawyers' judgment only in those cases where obedience to those restrictions does not actually constrain the professional assessments and decisions which they would otherwise make. I cannot say I am optimistic that this argument will be accepted, but I can say that if accepted it would vindicate the principle of equal access to justice, and free lawyers of restraints in the practice of poverty law that compromise principles long embodied in the codes of legal ethics.

RUSSELL G. PEARCE:

I will take thirty seconds on the remedies issues, because Steve Ellmann's talk suggested it, and some of you may not be familiar with the disciplinary system and what would happen, for example, if the ABA Ethics Opinion had said that it would be unethical for lawyers to work for entities that accepted the restrictions and what would happen if a disciplinary committee accepted that understanding of the law.

The remedy, if the restrictions are "unethical," is to censure, suspend, or disbar lawyers who work for legal services offices that take funds under those circumstances. I mention that, in part, because I understand that the question of remedy influenced the ABA in drafting its Opinion, correctly or not, and also just to underscore what Steve Ellmann said on the issue of there's another remedy, something I certainly had not thought of, that there's also the question, under Rule 5.4 and the related issue of unauthorized practice, whether legal services offices themselves are engaged in unauthorized practice, and would then have to be disbanded or would then be acting unlawfully, if we accepted this interpretation.

Let me turn to Steve Gillers. I already see hands. We'll open it to comments from the floor as soon as we finish the panel.

105. *Minister of Law and Order and Others v. Hurley and Another*, 1986 (3) SA 549 (A). I discuss this case in STEPHEN ELLMANN, *IN A TIME OF TROUBLE: LAW AND LIBERTY IN SOUTH AFRICA'S STATE OF EMERGENCY* 28-29, 53-56 (1992).

STEPHEN GILLERS:

Well, everyone is now on notice that unless they send in their resignation from their job by 5:00 p.m., they're disbarred.

I'm sitting here thinking this can't be so. I read Rules 5.4 and 1.8, a copy of which Helaine has brought, and indeed there is no consent or waiver aspect to either Rule. But, nevertheless, it can't be so. I think it can't be so for this reason: what those Rules prohibit is interference with the lawyer's independence of professional judgment once the case is underway. I don't think they prevent a lawyer and a client from agreeing to a particular scope for their representation at the outset. Scope can be referenced by both objectives and means. And, indeed, Rule 1.2 plus its Comment do envision allowing clients and lawyers to agree at the outset to limit the objectives or means of the representation.¹⁰⁶

Once that representation is undertaken within the constrained objectives or means, the lawyer's independent judgment may not be compromised or limited. If the person paying the fee does not do so, Rules 1.8 and 5.4 are satisfied.

That doesn't mean the Opinion is fine, however. I have a lot of trouble with the Opinion. I suppose my main objection is that it is essentially managerial. That is, it purports to tell legal services offices, in a kind of preachy way, about how they should behave in anticipation of the legislation, which did not come to pass as anticipated.

I think I am going to substitute for the word "managerial," micro-managerial, because I think that's really what it does. It intrudes excessively on the operation of a law office, and it does that with caveats and dictums that really cannot be anchored in the Model Rules or actually contradict the Model Rules. I'll mention one or two in a second.

But, first, let me suggest a kind of mind game with which to approach these questions. We have to do this because we cannot possibly describe, in any sensible way, all the multiple categories of representations that all the many kinds of legal services lawyers may undertake in a particular office and all of the multiple ways in which, at the outset or during the course of the representation, a particular congressional limitation could affect that representation.

Let me just talk about three categories in which the lawyer recognizes at the outset with a fair degree of confidence that the congressional limitations are going to pose no restriction on how he or

106. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 cmt (1997).

she behaves in a matter, or virtually no restriction, and the lawyer knows this by virtue of the experience the lawyer has had in that area of practice. Then, we can envision a middle category where the lawyer recognizes that there are things she will not be able to do that she might like to do, but she can still render a competent service to the client, limiting its objectives and means by agreement. And then there is a third category where the lawyer looks at what is excluded from her armory of strategies, goals, and legal services and says, "no competent lawyer with these restrictions could possibly accept your case, and I therefore can't, given what Congress has said to me." I realize there are many gradations between these three categories, but for ease let's think of those three.

The Opinion does something very interesting. It says in two places that it's the lawyer's job when this legislation is passed to tell every client about the restrictions imposed by the legislation — "must communicate the new restrictions to every client" — and then it bemoans the fact that this may take up a lot of telephone time; but, so be it, there's nothing that can be done.¹⁰⁷

It also says that "as regards future clients, the lawyer must inform all clients of the practice restrictions and obtain their written agreement to abide by those restrictions."¹⁰⁸ A little later it says that "such an agreement must be signed by each new client, even if the possibility of the statutory violation seems remote at best."¹⁰⁹

So now, going back to our three categories, the Opinion says even as to clients whose matters the restrictions will not, at a practical level, affect at all (which the lawyer as a professional knows because she has done this work for years) a current client has to get a call or (preferably) a letter saying, "I want you to know here is how Congress decided I will be restrained in my representation of you." And every new client, even one whose matter the restriction will not realistically affect, has to sign an agreement acknowledging the restriction.

I consider this to be, at best, ironic — and, at worst, I'll bleep it out — because many of us who labor in these vineyards had long urged the ABA to require various kinds of writings to commemorate agreements between lawyers and clients, but without success. Most prominently, when a client hires a lawyer in the first instance on a non-emergency basis, for a non-contingency matter, we have

107. Formal Op. 96-399, *supra* note 1, at 25.

108. *Id.* at 27.

109. *Id.*

urged that those retainers be reduced to writing. The ABA Model Rule does not do that.

Consider any other lawyer, a non-legal services lawyer, who limits the scope or objective of a representation, who can foresee a likely situation in which a means or an objective will become significant to the representation but who chooses to exclude it from the retainer, *that* lawyer does not have to use a writing at all. If the same lawyer anticipates only a remote restriction on the scope of work, he or she need not even talk to the client about it. But here we have an obligation, drawn from no text, to counsel current and prospective clients about restrictions that will not in the lawyer's judgment impinge on their matters, and to do so with prospective clients in writing — so doubly it seems to me to be a gratuitous imposition on the work of a legal services office. I am sure the Committee's motives were benign, that it was trying to help in a very difficult situation, but I don't see the need or wisdom, as a Committee issuing an Ethics Opinion, given the ways in which these opinions can be used by adversaries, to offer this help.

Let me give you one other, somewhat ambiguous example. The Committee opines that a lawyer can withdraw from representing a client in a matter, when the work or its objectives are no longer permissible, if continuing the work will hurt other current clients. That seems to be the only basis the Committee gives for withdrawal that it deems entirely legitimate.

I found this interesting because the Committee only glancingly refers to the provision of the Model Rules that permits a lawyer to withdraw if the representation will result in "an unreasonable financial burden on the lawyer."¹¹⁰ The Committee writes that the "loss of funding that would result from maintaining an ineligible representation may permit withdrawal under 1.16(b)(5)"¹¹¹ It then notes that this withdrawal "is permissive, not mandatory" and that "where loss of LSC funding would not result in the closing of the office or the need to withdraw from *all* pending matters, each legal services office will have to make its own determination as to whether the greater good is served by foregoing LSC funding"¹¹² Apparently all that goes into the balance are the relative interests of the clients who will or will not be served depending on which choice an office with some independent funding elects. Nothing is said about the interest of lawyers who will lose employ-

110. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(b)(5) (1997).

111. Formal Op. 96-399, *supra* note 1, at 25.

112. *Id.* (emphasis added).

ment. The withdrawal provision for lawyers in private practice, Rule 1.16, is decidedly more solicitous of their interests.

There is one part of the decision that I found correct, and perhaps obligatory, at least on the right facts, and that is the suggestion that legal services lawyers must in certain circumstances present to a court limitations that would, construed one way, require withdrawal, but construed another way, would not. The purpose is to see if a narrow construction is possible so that withdrawal would not be necessary.

Certainly, a judicial order or a judicial construction of a statute that eliminates the need to withdraw, by narrowing the restriction, would save the lawyer's and the client's situation. Similarly, if the judge said, "I don't care what Congress said, you were in this case before that law was passed, and Congress cannot tell me that I have to let you out; I'm not letting you out, you must continue," the lawyer would have an obligation to continue unless and until a higher court reversed that decision. So I do believe that zealous representation, if the facts support the argument, will generally require a lawyer to seek the narrowing construction and the judge's guidance. In any event, if a case is pending, the lawyer would have to seek the judge's guidance anyway because in every jurisdiction, one generally may not withdraw from a litigation without court permission.

I want to say a word about the attorneys' fees provision. We've been asked to talk about this because the statute eliminates the right of legal services lawyers to seek attorneys' fees, even if they are litigating under laws that provide for them. One way of looking at this would be to conclude that Congress is saying, "Look, we're providing a free lawyer to the client, so we can take away the right to a legal fee that client would otherwise have enjoyed if he or she prevailed. We're just substituting one compensatory system for another." And indeed, courts have said that the fee in a fee-shifting statute goes to the client; it's the client's right and, as courts have also said, it's the client's bargaining chip. So it makes some sense that Congress can withdraw it and in lieu thereof provide the lawyer directly.

It is true, however, that this bargaining chip has certain potency in negotiation because the ability to waive the attorneys' fee provides leverage for settlement. So the legal services lawyer who is retained in a fee-shifting matter and who cannot seek a fee is unable to provide that leverage for his or her client. That is a restriction that a non-legal services lawyer does not have to live with. Of

course, the non-legal services lawyer may also want to get paid. The shifted fee, unlike the compensation for legal services lawyers, is his or her only source of payment.

Does the client have to be told about the loss of this bargaining chip? I think that the answer to that question is discretionary, that it's not wise to provide it *ex ante* in an Ethics Opinion. Legal services lawyers, who see a real advantage for the client to get a private lawyer on a *pro bono* basis, with the use of the fee-shifting provision as a bargaining chip, should tell a client about the restriction; and if not, not. But I would not purport to say in an opinion how lawyers must behave in every situation.

Last point: Russ asks, "What should we do now about this Opinion?" Well, of course, this Opinion is advisory; it was issued before the law was adopted in anticipation of what it would say; the law does not say exactly what it anticipated; it also applies to the Model Rules, which in their exact formulation, I think, are adopted in no jurisdiction — there are changes everywhere, sometimes significant changes.

So there are three things we could do: first, we could criticize the Opinion vocally, as we have and should continue to do. Second, we can urge the ABA to revisit the Opinion in the spirit of enlightenment. Third, we can, failing all that, ignore the parts of the Opinion with which we disagree after study, which I think is a fine reaction, because the Opinion's reasoning and basis make part of it, at least, an unpersuasive authority. I would not hesitate, were I in a job affected by this Opinion, to make my own decision after consultation and careful consideration — even if that decision were contrary to some of what the Opinion says.

RUSSELL G. PEARCE:

Thank you, Steve. I'd like to close by thanking the panel for a very thoughtful and provocative presentation.

I'd like once again to thank Scott Rosenberg and April Newbauer of The Legal Aid Society, my colleague, Matt Diller, most important, the students who put this together — Steve Epstein, Eric Fields, Jack Pace, Staci Rosche.

Last, I'd like to say that we hope to see you the evening of November 5th and the day of November 6th, when we hold our next conference, which will focus on "Lawyering for the Poor in the Twentieth Century."

Thank you all very much.